VORYS

Publications

Lessons from EDI Litigation

Related Attorneys

Jonathan K. Stock

Scott J. Ziance

Related Services

Real Estate

Tax and Economic Development Incentives

Taxation

AUTHORED ARTICLE | Summer 2021

This article originally appeared in the Summer 2021 edition of *Development Incentives Quarterly*.

By: Jon Stock and Scott Ziance

When parties enter into an agreement for an economic development incentive, it's almost always with a sense of optimism. For the political subdivision or economic development organization, it typically means winning a new project with the promise of good paying jobs and new investment. For the company developing the project, it frequently means the award of key economic development incentives to make the project successful.

But what happens when things go awry and litigation follows? While this outcome is not common and parties routinely find ways to amend or renegotiate incentive agreements where performance problems arise, in a small number of cases, litigation becomes unavoidable. As unfortunate as that may be for the parties, those relatively few cases that wind up in court often teach valuable lessons.

This article identifies several common lessons that can be gleaned from EDI litigation and examines ways that parties can put those lessons to use (to either avoid litigation altogether, or failing that, prevail).

Defend or Advance from a Position of Strength

Case law is a good reminder of how important it can be to negotiate the best terms for an incentive agreement up front.

Parties negotiating an incentive agreement often have key terms that they would like to see included in the agreement. For companies, this list of key terms may include: (i) achievable metric commitments, (ii) flexible compliance requirements, (iii) a narrow definition of breach, and (iv) a limitation on remedies. For local governments providing the incentive, the key terms are typically a bit different and may include: (i) clearly defined metrics, (ii) robust reporting requirements, (iii) strong remedies against the company, and (iv) a limitation on damages against the local government. But what happens when a key term is left out?

Two cases in the past decade offer newsworthy examples of what can happen when a party fails to negotiate a meaningful limit on its damages in an incentive agreement. *See Mammoth Lakes Land Acquisition LLC v. Town of Mammoth Lakes*, Case No. C059239, 191 Cal. App. 4th 435 (Cal App. Dec. 30, 2010) and *Tooele Associates Limited Partnership v. Tooele City*, Case No. 20100504, 2012 UT App. 214 (Utah Ct. App. Aug. 2, 2012).[1]

In *Mammoth Lakes*, the town entered into a Development Agreement with a local developer that wanted to lease the land around the airport from the town with an option to purchase. However, the Federal Aviation Administration opposed the development around the airport and said the town was in jeopardy of losing federal funding for airport improvements if a hotel or condominium complex were built on the surrounding property. The town then began to drag its feet and refuse to process applications for the project development. In response, the developer sued the town for breach and when the case went to trial, a jury awarded the developer $30 million in damages. The trial judge also added $2.3 million in attorneys' fees under the prevailing party provision of the development agreement. The appellate court then affirmed the judgment.

A similar story played out in *Tooele Associates*. There, the City had also entered into a Development Agreement with a developer, and afterwards the developer claimed that the City tried to stymie the development of the project. A jury found the city liable and awarded the developer in in excess of $20 million in damages. While the trial court set aside the verdict, ruling that the jury's findings were "irreconcilably inconsistent", the appellate court disagreed. The appellate court ruled that the city had breached the development agreement and was liable for the jury award.

Conspicuously absent in each case was a meaningful limitation on contract damages that might have protected each of the respective local governments. In one case, *Mammoth Lakes*, an award of attorney's fees for the prevailing party even added to the judgment. The groundwork that allowed the developer to prevail in each of these cases started with the favorable terms in the development agreement -- and the absence of a key term (*i.e.*, a limitation on damages) turned the outcome into a newsworthy event.

Avoid Taking Unreasonable Positions

Courts instinctively disfavor sharp business practices. Any party whose argument before a court is based a dubious technicality or a strained interpretation of an agreement is unlikely to find favor. If given a choice between two parties, one of whom has behaved more reasonably, courts will frequently side with the better actor. That is particularly true in the case of incentives, which often rely on public funds.

This morality tale can be seen in two noteworthy decisions – one in favor of a City and one in favor of an incentive recipient – where each time, the party taking the more reasonable position prevailed.

In *City of Westlake v. VWS, Inc.*, 2014-Ohio-1833 (Ohio App. [Cuyahoga Cty.] May 1, 2014), the court held that a company failed to meet its contractual obligations by closing its operations and failing to perform for 5 of the 15 years required by the CRA Agreement. What made the decision in *Westlake* particularly notable is that the Court reached that decision even though the CRA Agreement did not expressly state whether the company had to continue its operations for a specific time period. Nevertheless, the *Westlake* court reasoned that even without such an express provision, “the 15-year exemption period was fundamental to the agreement and the parties' performance” and that each party had “expressed an intent to perform for 15 years under the CRA Agreement.” Although VWS claimed that its partial performance (*i.e.*, for 10 years) was sufficient, that technical argument was not credited. Instead, the court viewed the 15-year period as being “fundamental” to the CRA agreement and the parties’ performance and refused to overlook the parties’ “intent”.

On the other hand, even the best of the intentions will not justify a party deciding to act contrary to the explicit terms of an incentive agreement. In *Hyde Park Circle LLC v. City of Cincinnati*, 2016-Ohio-3130 (Ohio App. [Hamilton Cty.] May 25, 2016), the court approved, in part, an award of damages in favor of a developer where the city had spent tax-increment-financing (TIF) funds to complete work that should have been performed by the developer pursuant to the Development Agreement and TIF Service Agreement. The city, acting with presumably the best of intentions, also decided to dip into the TIF funds in order to pay the Cincinnati Public School District to make up for a budget shortfall. Nevertheless, the *Hyde Park* court held that the City had no right to use the TIF funds in a manner that was contrary to the agreements. As the court explained: “TIF laws were established to encourage economic development by diverting tax dollars to public projects within a TIF district. As a way to encourage development within all of the city neighborhoods, the City must abide by TIF laws. The public at large, not just [the developer], benefits from economic growth within the city.”

Although the *Westlake* and *Hyde Park* decisions arise from what appears on the surface to be very different facts, they do share a common thread. Each time, the litigant advancing the more reasonable position prevailed.

Don’t Forget Public Scrutiny

The parties to an incentive agreement are not the only potential source of litigation. Oftentimes, the members of the public or press will take an interest in major projects and submit public record requests. State public record laws typically allow such requests, and require all public records to be disclosed by a public office absent an applicable exemption. It is essential for parties negotiating an incentive agreement to be cognizant of the rules governing public record requests, and understand when those rules might subject their communications to public scrutiny.

In this context, litigation can serve as an important reminder that parties need to understand public record laws. In a recent case, an Ohio city attempted to argue that its incentive offer to Amazon for the HQ2 project was a trade secret and therefore not a public record. The Court of Claims rejected that argument and held that the city’s information regarding its incentive offer was not a trade secret, and except as noted below, was not otherwise exempt from disclosure under the Public Records Act. See *Buduson v. City of Cleveland*, 2019 2019-Ohio-963 (Court of Claims Feb. 12, 2019). The court allowed only one document included in the city’s offer to be withheld from disclosure – a letter created by JobsOhio, which is not a public record pursuant to R.C. 187.04(C)(1). Otherwise, the court rejected the City’s claim that the bid documents should be exempt from public scrutiny, noting that the City failed to satisfy the multi-factor test for a trade secret. The Buduson case teaches that, absent an applicable exception, an incentive offer or other document transmitted by a public office may be a public record subject to disclosure. Buduson also highlights the fact that this risk can begin with the initial offer.

Finally, it is important to keep in mind that public record laws in many states commonly apply to quasi-public entities. In Ohio, for example, a court has held that a port authority is a quasi-public agency which is subject to Ohio public records law. *State ex rel. R.R. Ventures v. Columbiana County Port*, 2004-Ohio-391, P1, 2004 Ohio App. LEXIS 342 (January 23, 2004). This case is a good reminder that a party to an incentive agreement should be cognizant of not only the information it shares, but also who it shares that information with, under public record laws.

Conclusion

Although most incentive agreements do not result in litigation, the ones that do can be instructive. EDI litigation can offer important reminders about the best practices that a party can adopt to protect itself under an incentive agreement, or if required, prevail in litigation.

---

[1] *See* "Tooele ordered to pay $20M to Developer", by Aaron Falk, Salt Lake Tribune, Aug. 2, 2012 (https://archive.sltrib.com/article.php?id=54617523&itype=CMSID); "Mammoth Lakes Found Liable For Breaching Development Deal", by Cori Badgley, California Planning and Development Report, Jan. 8, 2011 (https://www.cp-dr.com/articles/node-2848).