Lessons about Incentive Approval Risks from the Recent Rivian Court Decision

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On September 29, 2022, Judge Trammell, Chief Judge of the Ocmulgee Superior Courts in Georgia, issued an opinion denying the State of Georgia's request for a judgment validating the bonds and bond documents in support of an economic development incentive for Rivian Horizon, LLC (Rivian) to develop an electric vehicle manufacturing facility (the Project). Reviewing the court's detailed, 33-page decision (the Decision), which we understand the State of Georgia plans to appeal, provides helpful reminders about incentive approval risks from any approval body.

The Decision itself addresses an esoteric legal structure often used to exempt real or personal property taxes. In Georgia and certain other states, private sector-owned property cannot be exempted from property tax under the applicable state constitution. To provide private sector entities with an effective property tax exemption, economic development authorities in such states acquire property and lease it to private sector entities. Because the property is not owned by a private sector entity, it is exempt from property tax. To facilitate such transactions in Georgia, economic development authorities issue bonds that are purchased by the private sector lessee of the property or an affiliate of the lessee. The lessee then makes lease payments equal to the bond debt service in a "left pocket, right pocket" transaction that arguably does not have any economic substance (other than tax savings). Under Georgia law, the Superior County Court serves as the approval mechanism for revenue bond issuances, allowing interested parties to object and determine whether the financing has been properly structured and is legal. In other states, most local incentives are approved by a legislative authority of a political subdivision.

Without delving into the intricacies of Georgia law, or reviewing the merits beyond the four corners of the opinion itself, the Decision found the proponents, the State and the local joint development authority (JDA), failed to establish a *prima facie* case to support validation of the bonds, finding that the applicants did not establish that the Project and the bonds were "sound, feasible and reasonable" and that "the Project and/or Bonds will promote the general welfare of the local community." Regardless of the outcome of any appeal, the Decision highlights several lessons for all economic development projects, whether from the perspective of the economic development agency, the beneficiary or the incentive provider, to deal with approval risks. Approval risk includes, like in Georgia, that local residents will object and the decision makers (whether judges, legislators, government appointees or others) will determine not to proceed with the incentive due to local or other vocal objections.

Lesson #1 – Highlight Community, Local, Regional and State Implications of the Project

The Decision in Rivian found that the State and the JDA did not demonstrate that they took into account the impact of the Project on the local community in any meaningful way. The focus prior to the hearing was on the "rate of return" on the state incentives, and not any increased costs for infrastructure or maintenance on the counties where the Project would be located. To mitigate this risk, do not rely on the state economic development team to do all the work for your project. Communicate with the local communities as well and seek their support and buy-in that they are benefitting as well. Consider seeking a development agreement or other document you can use to show the cooperation and memorialize the intangible benefits to the parties (such as support for local training and hiring).

Lesson #2 – Hearing Preparation is Critical

In many jurisdictions, incentive approvals are routine. However, it is important that whomever is presenting at that meeting be prepared with enough information to support the project, possibly with a company representative in attendance to provide additional support. Always ask if a company representative should attend any hearings, and make sure the economic development professional has sufficient information to adequately represent the project.

Lesson #3 – Confirm Due Diligence is Reflected in the Presentation and Documents

Economic development organizations usually perform thorough due diligence on potential awardees, but it is helpful if that information is reflected in the presentation or request to the legislative authority, commission or other deciding body. If the party seeking the incentive has something negative in its history, it is usually best to tackle this head-on, explain how it has been remedied, and be able to answer any additional questions about it.

Lesson #4 – Stay Current on the News

Whether you are the incentive provider, recipient or decision maker for the award, it is critical that you stay abreast of any news that may impact the transaction. According to the Decision, the State and JDA did not address recently updated financial information from Rivian, and the objectors highlighted that information and the risks it presented. News can be good or bad, but it is better to have representatives prepared to discuss it than leave it any opponents to highlight.

Lesson #5 – Proper Planning

To mitigate approval risk, there are several steps that can help. First, try to schedule approvals timely so that the information from the applicant is fresh and accurate. Second, determine who should attend the approval hearing. There may be benefits to not attending, but the applicant should make sure enough information can be presented to support the award. Third, be prepared for the approval hearing, including having appropriate talking points and understanding of the approval organization and its policies.

It is important not to take a “routine” approval process for granted. Be sure that communication between the economic development team for the incentive provider and the beneficiary’s team is consistent, current and accurate.

Vorys encourages you to contact your Vorys attorney or advisor with questions about the incentive approval processes and these lessons learned. Please feel free to contact the following Vorys attorneys: Scott J. Ziance, 614.464.8287, sjziance@vorys.com; Christopher J. Knezevic, 614.464.5627, cjknezevic@vorys.com; Sean Byrne, 614.464.8247, spbyrne@vorys.com; Jonathan K. Stock, 614.464.5647, jkstock@vorys.com or R. Elissa Wilson, 614.464.6224; rewilson@vorys.com.