

BUSINESS IMPROVEMENT DISTRICTS AND THE EVOLUTION OF URBAN GOVERNANCE

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This symposium issue of the *Drexel Law Review* provides an in-depth examination of business improvement districts (BIDs) in Philadelphia, including case studies of each BID in the city, commentary on those case studies by law school faculty (Richard Briffault, Gerald Frug, Nicole Stelle Garnett, and Richard Schragger), and essays by three practitioners (Paul Levy, Lawrence Houstoun, and Dan Hoffman) who have worked closely in and around the world of BIDs, both in Philadelphia and elsewhere. In this introduction, I discuss the case studies and commentaries to provide a brief historical overview of the role of BIDs in Philadelphia, and I will suggest how one may see the role of BIDs in the city as part of a process of institutional evolution.

I. BIDs IN PHILADELPHIA: A VERY BRIEF HISTORY

BIDs are distinguished from other local economic development organizations primarily by their ability to levy property taxes or assessments.¹ Two organizations discussed in this issue (the University City District and the Sports Complex Special Services District) do not levy assessments but generate revenues through other means, as discussed in the case studies by Juliet Gainsborough and Thomas Vicino.² These two organizations are included in this issue

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1. For the distinction between taxes and assessments see Nicole Stelle Garnett, *Governing? Gentrifying? Seceding? Real-Time Answers to Questions About Business Improvement Districts*, 3 DREXEL L. REV. 35, 38–40 (2010).

2. Juliet F. Gainsborough, *The Sports Complex Special Services District: Thirty Million Dollars for Your Trouble*, 3 DREXEL L. REV. 155, 157 (2010); Thomas J. Vicino, *New Boundaries of Urban Governance: An Analysis of Philadelphia's University City District*, 3 DREXEL L. REV. 339, 347 (2010).

because they are otherwise functionally and organizationally similar to the other BIDs.

The BID is an organizational form that is, in some respects, relatively new to Philadelphia (and to other cities), yet, in other respects, very old. The first official BID established in Philadelphia was the Center City District (CCD), in 1990, which replaced the less powerful Central Philadelphia Development Corporation.³ After the CCD, the South Street Headhouse District was established in 1992, and five other BIDs were then established between 1995 and 1998. These early BIDs were all created by city ordinances passed under the authority of the Pennsylvania Municipality Authorities Act (colloquially known as the Municipal Authorities Act), which was itself first passed in 1935 in order to establish new government entities that were not encumbered with previous debt. This enabled local governments to operate without having their borrowing restricted by legal debt limits, thus allowing them to issue revenue bonds to raise the money needed to meet the matching requirements for federal grants.⁴

In 1945, the Municipal Authorities Act was significantly altered to provide “greater flexibility in operation and in the type of bonds issued,”⁵ and it was under the authority of the 1945 Act that Philadelphia established its first BIDs in the 1990s. As Paul Levy notes in his Article in this issue, establishing BIDs was a relatively innovative use of the Municipal Authorities Act, which had been used mostly for the purposes of financing water and sewer systems, school buildings, and hospitals.⁶ In 2000, the Pennsylvania General Assembly passed a law specifically for establishing BIDs or neighborhood improvement districts (NIDs), in the parlance of the law, the Neighborhood Improvement District Act. The new law provided municipalities “the broadest possible discretion in establishing by local ordinance the type of assessment-based programs most consistent with neighborhood needs, goals, and objectives as determined and expressed by property owners in the designated district.”⁷ The

3. For more on the establishment of the CCD, see JOHN KROMER, *FIXING BROKEN CITIES: THE IMPLEMENTATION OF URBAN DEVELOPMENT STRATEGIES* 49-75 (2010), and Göktuğ Morçöl, *Center City District: A Case of Comprehensive Downtown BIDs*, 3 DREXEL L. REV. 271, 274-79 (2010).

4. *Municipal Authorities in Pennsylvania*, GOVERNOR’S CTR. FOR LOCAL GOV’T SERVS., 8 (9th ed. Aug. 2002), <http://www.penntrain.net/NewFiles/Boards/munauthority.pdf>.

5. *Id.* at 8.

6. *Id.* at 8-9.

7. Neighborhood Improvement District Act of 2000, 2000 Pa. Laws 130, 73 PA. CONS. STAT. ANN. § 832(4) (West 2008).

NID Act served as the enabling legislation for the eight BIDs that have been established in Philadelphia since 2000—including the Frankford Special Services District, which, as Whitney Kummerow notes in her case study, was first established in 1995 under the Municipal Authorities Act but, after going defunct, was reestablished in 2007 under the NID Act.⁸

Of the eight BIDs established under the NID Act, the most recent is the Greater Cheltenham Business Improvement District (GCBID). This BID, as Craig Wheeland explains, was initially established in 2008 but had to be re-established in 2010 because a clerical error nullified the initial authorizing ordinance.⁹ Like the City Avenue District, the GCBID is unique for covering a territory that crosses municipal boundaries, thus it is the joint creation of the City of Philadelphia and Cheltenham Township, which passed its authorizing ordinance for the BID in 2007. A final BID in the city, in the northwestern neighborhood of East Falls, has been planned, and a bill was presented to the city council in 2009, but it has not yet received an authorizing ordinance.

While the history of BIDs in Philadelphia is formally quite short, going back only to 1990, the more general idea of local assessment districts has a much older lineage. Indeed, in the eighteenth century, the Pennsylvania Assembly provided city residents the authority to establish special “improvement commissions,” which could provide local services independent of the city council. For example, such improvement commissions were used to establish a night watch in 1751 and a public street paving program in 1762.¹⁰

In fact, prior to the 1854 city-county consolidation that created the 130-square-mile city that we know today,¹¹ Philadelphia could itself be considered a special business district. In 1682, William Penn organized his colony into three counties: Chester, Bucks, and Philadelphia.¹² Until 1854, the City of Philadelphia was only a small part of the larger county, consisting of a two-square-mile strip of land between the Schuylkill and Delaware Rivers. Throughout its 172-year

8. Whitney Kummerow, *Finding Opportunity While Meeting Needs: The Frankford Special Services District*, 3 DREXEL L. REV. 243, 246–48 (2010).

9. Craig M. Wheeland, *The Greater Cheltenham Avenue Business Improvement District: Fostering Business and Creating Community Across City and Suburb*, 3 DREXEL L. REV. 357, 358 (2010).

10. CARL BRIDENBAUGH, *CITIES IN REVOLT: URBAN LIFE IN AMERICA, 1743–1776*, at 30, 109 (1955); JON C. TEAFORD, *THE MUNICIPAL REVOLUTION IN AMERICA: ORIGINS OF MODERN URBAN GOVERNMENT* 57–58 (1975).

11. See Elizabeth M. Geffen, *Industrial Development and Social Crisis 1841–1854*, in *PHILADELPHIA: A 300-YEAR HISTORY* 359–61 (Russel F. Weigley ed. 1982).

12. *Id.* at 24.

history, Philadelphia County included twenty-eight additional “districts, boroughs and townships,” with names such as Roxborough, Germantown, Manayunk, Richmond, Aramingo, Frankford, Southwark, Northern Liberties, West Philadelphia, and Passyunk.¹³ As these names suggest, there is a notable correspondence between the locations and identities of Philadelphia’s former municipalities and the BIDs that have been established since 1990. Indeed, the CCD covers much the same territory as the pre-consolidation city.

As Professor Richard Briffault has noted elsewhere, Philadelphia BIDs resurrect not only the names of old municipalities but also some older municipal practices, such as restricting suffrage to property holders, and the self-perpetuating “closed corporation” status that was typical of municipalities in the seventeenth and eighteenth centuries.¹⁴ And as Professor Gerald Frug notes, the resurrection of early modern municipal practices in the form of BIDs has also replaced the Great Society era focus on community action through democratic neighborhood governance.¹⁵

To the extent that the municipalities of Philadelphia County provided public services, they did so separately. For instance, in 1810, Northern Liberties installed oil street lamps and established a night watch, as did Southwark in 1812.¹⁶ Later, separate companies supplied gas for street lighting in Southwark, Moyamensing, Richmond, Spring Garden, West Philadelphia, Kensington, German town, and Northern Liberties.¹⁷ In the 1840s, incensed at the price Philadelphia City was charging the outlying municipalities for piped water, Spring Garden and Northern Liberties joined together to build a separate waterworks drawing from the Schuylkill River,

13. See BUREAU OF ENG’G & SURVEYS, PHILA. CITY PLANS DIV., MAP SHOWING DISTRICTS, BOROUGH & TOWNSHIPS INCORPORATED IN CONSOLIDATION OF PHILADELPHIA IN 1854, reprinted in JOHN DALY & ALLEN WEINBERG, GENEALOGY OF PHILADELPHIA COUNTY SUBDIVISIONS 51 (2d ed. 1966), available at <http://www.library.upenn.edu/datasets/images/census/1854twpa.jpg>.

14. See Jerome Hodos, *Against Exceptionalism: Intercurrence and Intergovernmental Relations in Britain and the United States*, in THE CITY IN AMERICAN POLITICAL DEVELOPMENT 44, 47, 49 (Richardson Dilworth ed., 2009), for a discussion of closed corporations in seventeenth- and eighteenth-century American and British municipalities. See Richard Briffault, *The Business Improvement District Comes of Age*, 3 DREXEL L. REV. 19, 24–26 (2010), for an example of BIDs using a closed corporation form of organization.

15. Gerald E. Frug, *The Seductions of Form*, 3 DREXEL L. REV. 11, 16–17 (2010).

16. HOWARD O. SPROGLE, THE PHILADELPHIA POLICE, PAST AND PRESENT 73 (1887).

17. Edward W. Bemis & W.S. Outerbridge, Jr., *Municipal Ownership of Gas in the United States*, 6 PUBLICATIONS OF THE AM. ECON. ASS’N 9, 156–57, 160 (1891).

and Kensington built its own waterworks drawing from the Delaware in 1850.¹⁸

The provision of separate police services in the county's multiple municipalities became a significant burden by at least the 1840s, as public disorder, violence, and riots became more common. As Howard Sprogle noted in his classic history of the Philadelphia Police:

A boundary street, running between one district and another, was as effectual a barrier to the passage of a policeman or constable across it to an adjoining district as the Chinese wall. When there were riots in Moyamensing, the city police might be massed in a body on the north side of Cedar or South streets, and be witnesses of the riot, murder or arson within fifty feet of their station without having the right to interfere. A riot in the city was likewise no affair of the police of the districts.¹⁹

To address this problem, the Pennsylvania legislature provided for a consolidated police force in 1850, with an elected marshal whose jurisdiction covered the City of Philadelphia and at least the neighboring districts.²⁰ The consolidation of the police presaged the city-county consolidation of 1854. As the historian Andrew Heath has put it, "what began as a movement to extend police powers over a limited area gradually became wedded to a more ambitious program of urban reconstruction and economic expansion that culminated in the annexation of the entire county."²¹

The fact that Philadelphia's BIDs appear to resurrect the former municipalities of which they are namesakes suggests the extent to which the 1854 consolidation was never quite complete. Yet the city's BIDs are not merely a return to the past, as they are also a reflection of the more recent devolutionary trend away from traditional government, to the provision of services by the "third-sector" of private contractors, "public-private partnerships," quasi-public

18. NELSON MANFRED BLAKE, *WATER FOR THE CITIES: A HISTORY OF THE URBAN WATER SUPPLY PROBLEM IN THE UNITED STATES* 99 (1956).

19. SPROGLE, *supra* note 16, at 84-85.

20. Sprogle is unclear as to whether or not the newly consolidated police force covered the entire county or just select municipalities. He notes that "on the 3d of May, 1850, the Legislature passed an act directing that the citizens of Philadelphia, Northern Liberties, Southwark, Spring Garden, Richmond and Penn districts should, at the next fall election, choose one person to serve for three years as marshal of the Philadelphia Police District." *Id.* at 93-94.

21. Andrew D. Heath, "The Manifest Destiny of Philadelphia: Imperialism, Republicanism, and the Remaking of a City and Its People, 1837-1877," at 20 (2008) (unpublished Ph.D. dissertation, University of Pennsylvania) (on file with the University of Pennsylvania).

corporations, and public authorities.²² And like the larger trend of which they are a part, BIDs threaten to exacerbate and increase social inequalities by fracturing the public sphere into smaller parts.

II. THE DEVELOPMENT OF BIDS AS A PROCESS OF INSTITUTIONAL EVOLUTION

I have suggested so far that BIDs are a recent manifestation of an older organizational form (independent commissions serving as local quasi-governments for neighborhoods that were once independent municipalities themselves), the significance of which has changed in a new policy environment—namely the devolutionary, neoliberal “new governance” environment that crystallized in the last few decades of the twentieth century. Given their central role as an adaptive mechanism in a new environment, BIDs thus seem like potentially fruitful subjects for examining the dynamics of institutional evolution. As Briffault notes in his contribution to this issue: “[i]f the success of a new institutional form, like a plant or animal species, can be measured by the extent of its spread and its adaptation to a variety of settings, then the Philadelphia experience tells us that the BID is surely a great success.”²³

Like other Rust Belt cities, Philadelphia has long been at a structural competitive disadvantage to the surrounding suburban municipalities. Many of the municipalities surrounding the city have minimal to no redistributive burden because they have few poor people who require services, yet who also pay little in taxes.²⁴ As a result, since the 1950s, middle- and upper-income families have been leaving Philadelphia, and businesses have followed, with the net result that the city is the only municipality in the metropolitan region to have a decline in population since World War II and a relatively greater number of poor people.²⁵ In this context, BIDs appear as adaptations of suburban municipalities laid over the central city. Located in the more affluent neighborhoods, they capture tax dollars that will not be redistributed for welfare purposes outside the district and often with the explicit purpose of making their districts

22. See CAROLYN ADAMS ET AL., *RESTRUCTURING THE PHILADELPHIA REGION: METROPOLITAN DIVISIONS AND INEQUALITY* 169–70 (2008), for a discussion of third-sector governance and how it relates specifically to BIDs in Philadelphia.

23. Briffault, *supra* note 14, at 21.

24. See PAUL E. PETERSON, *CITY LIMITS* 93–106 (1981), for a classic example of this relatively common argument.

25. ADAMS ET AL., *supra* note 22, at 15–35.

competitive with outlying regional commercial corridors. As Richard Schragger notes in his contribution to this issue: “[t]he BID is intended to make . . . areas more competitive with the suburban shopping mall by investing in public safety, street furniture, sanitation, lighting, infrastructure, promotion, and advertising.”²⁶

As this issue makes clear, there are exceptions to the rule that Philadelphia’s BIDs can be seen as central-city adaptations of either shopping malls or suburban municipalities. The Port Richmond Industrial Development Enterprise looks more like an industrial park than a suburb, and the Center City, South Street Headhouse, and Old City Districts represent amenities and attractions perhaps too unique to be equated with suburban municipalities or malls. Robert Stokes notes as well that both the Germantown and Frankford BIDs “represented a novel use of the BID model in areas with significant economic, social, and physical challenges.”²⁷ Both the Frankford and Germantown BIDs, however, have faced some of the greatest obstacles to success, with the Frankford district even having gone defunct for a period of time.

If Germantown and Frankford represent perhaps the limit to which the BID model can be used for local economic development, they also challenge the use of the evolutionary metaphor in explaining organizational change in urban governance. For instance, economist Geoffrey Hodgson, one of the most explicitly Darwinian contemporary social scientists, has suggested that institutional change be conceived of in terms of “mechanisms of inheritance” that can explain continuity and stability, and the processes by which certain characteristics are selected or rejected, thus allowing for change.²⁸ Yet the persistence of the Germantown and Frankford BIDs suggests possibly the extent to which human agency and willfulness can counteract the institutional equivalent of natural selection.

The two BIDs that span across two municipalities—City Avenue and the GCBID—are also more suggestive of human ingenuity and creativity in organizational design than natural selection. As Professor Nicole Stelle Garnett points out, these two cross-border BIDs

26. Richard Schragger, *Does Governance Matter? The Case of Business Improvement Districts and the Urban Resurgence*, 3 DREXEL L. REV. 49, 50 (2010).

27. Robert Stokes, *The Challenges of Using BIDs in Lower-Income Areas: The Case of Germantown, Philadelphia*, 3 DREXEL L. REV. 325, 325 (2010).

28. GEOFFREY M. HODGSON, *THE EVOLUTION OF INSTITUTIONAL ECONOMICS: AGENCY, STRUCTURE AND DARWINISM IN AMERICAN INSTITUTIONALISM* 96–97 (2004). For the purposes of this Introduction, I focus on only three of Hodgson’s seven philosophical principles, which are part of his larger project of reintegrating Darwinian theory into institutionalist social science.

likely come closest to being genuine governments, since “it is at least plausible to assume that the cross-jurisdictional BIDs are exercising authority independent of either of the two municipalities that acted to create them.”²⁹ By creating a new governmental authority that blurs traditional municipal borders, these BIDs are thus transforming, rather than adapting to, an institutional ecological niche.

The economist Douglass North has proffered a model of institutional evolution that focuses to a greater extent on willful human action. North defines institutions as the “underlying rules of the game,” and organizations as entities created by individuals attempting to take advantage of the underlying institutional rules.³⁰ Institutional evolution is defined by the symbiotic relationship by which specific organizations become locked into, and thus reinforce, a given institutional framework, and the simultaneous process by which organizations gradually alter the underlying institutional rules.³¹

North’s depiction of institutional evolution directs us to ask how BIDs, as organizations, affect the larger institutional structure of the city and metropolitan region. If BIDs can be conceived of as strategic adaptations of suburban municipal forms in the institutional context of a central city and metropolitan region, how do BIDs in turn alter that institutional context? Schragger suggests that, contrary to critics’ concerns that BID assessments would ultimately crowd out city taxes that could go to broader services, BIDs have in fact had a minimal impact, since their budgets are so small compared to those of the cities they occupy.³² As Briffault notes, BIDs have become “part of the fabric of urban governance, but they are far from transformative.”³³

Indeed, while the total budget of all Philadelphia BIDs is annually in the tens of millions of dollars, it is dwarfed by Philadelphia’s annual general fund budget of well over \$3.5 billion.³⁴ Yet small as it is, the total Philadelphia BID budget is notable for having increased into the tens of millions from a base of zero in 1990, for services cov-

29. Garnett, *supra* note 1, at 41–42.

30. DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 4, 7 (1990).

31. *Id.* at 4.

32. Schragger, *supra* note 26, at 54–55.

33. Briffault, *supra* note 14, at 24.

34. See Pa. Intergovernmental Cooperation Auth., *Philadelphia’s General Fund Budget: A Citizen’s Guide* 3 (2009), <http://www.picapa.org/docs/Guide%20to%20Philadelphia's%20General%20Fund%20Budget.pdf>.

ering a much smaller (though steadily increasing) population and territory than the city. Moreover, the multijurisdictional BIDs are engaged in an organizational reformulation of the city's borders that is perhaps more significant than budgets alone suggest. Finally, BIDs have shown a remarkable persistence—even the one failure since 1990 was brought back to life in 2007—and they thus appear to define a highly “path-dependent” process of development³⁵ that, while it may have recently slowed, as Briffault suggests, shows no sign of abating and every sign of making continuous, steady progress (as indicated, for instance, in the pending East Falls BID).

We might find a still greater significance for BIDs in what they can tell us about the longevity and durability of the early modern municipal form, the hybrid nature of which was lost in the process of American political development. As Frug has argued elsewhere, early American cities were commercial associations that possessed both public and private functions—“entities intermediate between . . . the state and the individual.”³⁶ To fit into a political system that could not easily cope with such intermediate organizations, cities were gradually divided, with private rights and powers reserved for private corporations, and cities reformulated as adjuncts of state government. BIDs, as hybrids that look like both governments and private associations, and which resuscitate early modern municipalities, appear to also resuscitate the early intermediate nature of cities. And though Frug in this issue provides a note of caution about the role of BIDs in making community decisions, he has in his earlier work suggested that it is precisely the resurgence of the hybrid nature of cities that could lead to greater, as he termed it (following Hannah Arendt), “public freedom.”³⁷

In short, while BIDs have become a standard feature of cities, their meaning and significance is still open to question. They may or may not be considered governments, they may provide for either more or less meaningful public participation, and they are a new form of governance at the same time as they reflect political divisions and organizational forms from prior centuries. The case studies and commentaries in this issue represent at least a down payment, for one city, toward clarifying some of these issues—enjoy!

35. See PAUL PIERSON, *POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS* 17–53 (2004).

36. Gerald Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1059 (1980).

37. *Id.* at 1068.