

## THE SEDUCTIONS OF FORM

*Gerald E. Frug\**

Philadelphia has more than a dozen business improvement districts, entities commonly called BIDs.<sup>1</sup> The papers in this Symposium describe each of them in some detail. This kind of study is both valuable and unusual. Although BIDs have been subject to academic analysis in general terms,<sup>2</sup> this Symposium offers the first examination that I know of the different BIDs within a single city. It thereby enables a comparative view within one legal system of what a BID is and what it does. My focus here will concentrate on one question concerning Philadelphia's BIDs: in creating these kinds of institutions, whom exactly has the legal system authorized to tap precisely what kinds of resources to do what? As I argue below, Philadelphia's BIDs offer a wide variety of answers to each of the elements in this question. These differences generate for me a puzzle—why have so many different neighborhoods adopted the same legal form to accomplish such different objectives? I turn to this puzzle below, after I examine the differences among Philadelphia's BIDs.

### I. THE DEFINITION OF A BID

The most useful general definition of a BID offered in the various studies<sup>3</sup> is by Hoyt and Gopal-Agge. BIDs, they say, are “privately

---

\* Louis D. Brandeis Professor of Law, Harvard Law School.

1. Philadelphia has fourteen BIDs organized under either the Pennsylvania Municipal Authorities Act or the Neighborhood Improvement District Act. See Daniel Hoffman & Lawrence O. Houstoun, Jr., *Business Improvement Districts as a Tool for Improving Philadelphia's Economy*, 3 DREXEL L. REV. 89, 92 (2010); see also Municipal Authorities Act § 1, 53 PA. CONS. STAT. §§ 5601-23 (West 2009); Neighborhood Improvement District Act § 1, 73 PA. CONS. STAT. §§ 831-40 (West 2008).

2. A number of authors have examined BIDs generally. See, e.g., LAWRENCE O. HOUSTOUN, JR., BIDS: BUSINESS IMPROVEMENT DISTRICTS (2d ed. 2003); Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365 (1999); Daniel R. Garodnick, *What's the BID Deal? Can the Grand Central Business Improvement District Serve a Special Limited Purpose?*, 148 U. PA. L. REV. 1733 (2000); Göktuğ Morçöl & Patricia A. Patrick, *Business Improvement Districts in Pennsylvania: Implications for Democratic Metropolitan Governance*, in BUSINESS IMPROVEMENT DISTRICTS: RESEARCH, THEORIES, AND CONTROVERSIES 289-318 (Göktuğ Morçöl, et al. eds., 2008).

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

directed and publicly sanctioned organizations that supplement public services within geographically defined boundaries by generating multiyear revenue through a compulsory assessment on local property owners and/or businesses.”<sup>4</sup> The key contribution offered by this definition is making clear that BIDs are a form of publicly sanctioned private power. In other words, despite suggestions made by some of the studies, BIDs are not public-private partnerships,<sup>5</sup> not a form of general government,<sup>6</sup> and not an example of urban entrepreneurial governance;<sup>7</sup> they are also not like a shopping mall.<sup>8</sup> BIDs are created by the government, and it is the delegation of public power to these organizations that enables them to exercise their distinctive form of private power.

The Hoyt and Gopal-Agge definition also highlights three other important features of BIDs. The first concerns the kind of private power that the government is sanctioning by creating a BID. The key question in this regard is: Whose private power is it? In other words, who runs the organization and makes its decisions? Most of the studies do not reveal precisely who the board members are. But they all demonstrate that Philadelphia’s BIDs are not organized as democratic institutions. BID directors are appointed, not elected.<sup>9</sup> Although the studies often do not make clear who makes these appointments, it seems clear that the ordinances that authorize the creation of each individual BID specify their own appointment process. In most of the BIDs, those appointed share something in common: they represent the commercial property owners whose resources fund the operation of the BID. The appointment process, in other words, embraces the idea that those who pay the bills should decide how the money is spent. This is a familiar business model: private enterprise is frequently organized this way. But it is not how democracies operate. In a democracy, decision-making power is al-

---

4. Lorlene Hoyt & Devika Gopal-Agge, *The Business Improvement District Model: A Balanced Review of Contemporary Debates*, 2 GEOGRAPHY COMPASS 946, 946 (2007).

5. See, e.g., Thomas J.B. Cole & Seth A. Grossman, *The Chestnut Hill Business Improvement District: Learning from Other BIDs*, 3 DREXEL L. REV. 125, 137 (2010).

6. See, e.g., Göktuğ Morçöl, *Center City District: A Case of Comprehensive Downtown BIDs*, 3 DREXEL L. REV. 271, 272 (2010).

7. See Fayth Ruffin, *Roxborough on the Rise: A Case of Generating Sustainable Buy-In*, 3 DREXEL L. REV. 309, 309 (2010).

8. See, e.g., Wayne Batchis, *Privatized Government in a Diverse Urban Neighborhood: Mt. Airy Business Improvement District*, 3 DREXEL L. REV. 109, 118 (2010).

9. See, e.g., Phila., Pa., Ordinance No. 040008 ex. A-4 § 3.01 (June 21, 2004) (describing the process of appointing directors for the Chestnut Hill BID).

located to people elected by citizens generally, regardless of their ability to pay the government's expenses.

A second key concept emphasized by Hoyt and Gopal-Agge concerns how BIDs generate revenue. BIDs get their money, they say, through "a compulsory assessment on local property owners and/or businesses."<sup>10</sup> This ability to force unwilling property owners to contribute to a BID's funding is an important—probably the most important—ingredient in the government's delegation of power to these organizations. The assessments are like taxes: even property owners opposed to the creation of a BID or opposed to the way it operates have to pay the assessment.<sup>11</sup> Philadelphia's most important BID—the Center City District—relies to a very considerable extent on this source of funding.

The final ingredient in the Hoyt and Gopal-Agge definition concerns what BIDs do. Their task, the authors say, is to provide supplementary public services in a geographically-defined neighborhood. As we shall see, what this means differs by neighborhood. But a common agenda for almost all of Philadelphia's BIDs involves providing security and street cleaning services in the neighborhood's commercial area. In the vocabulary of a number of the studies, BIDs deal with "crime and grime." Of course, the City of Philadelphia is responsible for crime and grime too. Police and sanitation are quintessential city services. Hence the importance of the word "supplement": BIDs are designed to add to city services that the city government itself provides city-wide.

## II. THE DIFFERENCES AMONG PHILADELPHIA'S BIDS

Despite the usefulness of the Hoyt and Gopal-Agge definition of a BID, Philadelphia's BIDs demonstrate its ambiguities. Let's begin with who the decision makers are. The traditional way to organize a BID, as noted above, is to allocate decision-making power to commercial property owners. In Philadelphia, however, this model is not universal. Indeed, even when the he-who-pays-calls-the-tune concept is embraced, its meaning differs from neighborhood to neighborhood. The Manayunk Development Corporation, according

---

10. Hoyt & Gopal-Agge, *supra* note 4, at 946.

11. See, e.g., 53 PA. CONS. STAT. ANN. § 5607(d)(27) (West 2005); 73 PA. CONS. STAT. ANN. §§ 834(5), 837(b), (d) (West 2001). Both of these laws explain the assessment process and also enable the BID to obtain a lien in the event of nonpayment of an assessment.

to the study, acts as the local chamber of commerce;<sup>12</sup> the Chestnut Hill Neighborhood Improvement District includes a wider variety of commercial property owners than do many of the other BIDs;<sup>13</sup> and the Old City Special Services District provides a role for two specific property owners.<sup>14</sup> Even more importantly, some BIDs add other kinds of people to their governing board, such as public officials.<sup>15</sup> In fact, until recently the East Passyunk Avenue BID was closely associated with a single major local politician.<sup>16</sup> But local community development corporations also sometimes play a central role,<sup>17</sup> as do local people without regard to their property ownership or their involvement with the community development corporation.<sup>18</sup> The Germantown Special Services District includes in its leadership representatives of non-profits, local residents, and the high school principal.<sup>19</sup> Given the very different kinds of people exercising publicly-sanctioned private power across the city of Philadelphia, the question arises, who *should* exercise the private power delegated to a BID? Indeed, the same question can be posed to every current BID in Philadelphia: Why are these people, and not others in the neighborhood, given decision-making power? The variation among Philadelphia's BIDs matters. The composition of the leadership determines who makes the policy decisions for the BID and, thus, what that policy is.

---

12. See Richard M. Flanagan, *Manayunk Development Corporation: The Search for Sustainable Gentrification and a Parking Spot*, 3 DREXEL L. REV. 139, 139 (2010).

13. See Cole & Grossman, *supra* note 5, at 129.

14. Dorothy Ives-Dewey, *Clean, Safe, and Pretty: The Emerging Planning Role of the Old City District*, 3 DREXEL L. REV. 209, 216 (2010) (explaining that after the district invited a company in opposition to the founding to send a representative to join the Old City District board, a Kaiserman company representative has been on the board since the founding).

15. For example, a police representative serves on the steering committee for the Port Richmond Industrial Development Enterprise. See Aman McLeod, *The Port Richmond Industrial Development Enterprise: A Successful Model for Preserving Urban Industry*, 3 DREXEL L. REV. 253, 269 (2010).

16. See generally Jonathan B. Justice, *Moving On: The East Passyunk Business Improvement District*, 3 DREXEL L. REV. 227, 227–28 (2010) (explaining the extensive relationship between the East Passyunk BID and State Senator Vincent Fumo's other organizations as well as the opportunities and challenges that followed Fumo's conviction on corruption charges).

17. See, e.g., Batchis, *supra* note 8, at 113; Jill Simone Gross, *The Aramingo Avenue Shopping District: Stakeholder's Bridge or Border Divide?*, 3 DREXEL L. REV. 171, 182 (2010).

18. See, e.g., Batchis, *supra* note 8, at 115; Whitney Kummerow, *Finding Opportunity While Meeting Needs: The Frankford Special Services District*, 3 DREXEL L. REV. 243, 248 (2010); Juliet F. Gainsborough, *The Sports Complex Special Services District: Thirty Million Dollars for Your Trouble*, 3 DREXEL L. REV. 155, 162 (2010); Wheeland, *supra* note 3, at 363–64.

19. Robert Stokes, *The Challenges of Using BIDs in Lower-Income Areas: The Case of Germantown, Philadelphia*, 3 DREXEL L. REV. 325, 332 (2010).

Philadelphia's BIDs also vary considerably in terms of the usefulness of the characteristic way of raising revenue: a compulsory assessment imposed on all local commercial property owners within the neighborhood's commercial district. BIDs in neighborhoods with other sources of revenue do not rely as heavily as others on this kind of a compulsory assessment. Almost one quarter of the East Passyunk Avenue Business Improvement District's revenue derives from just 3% of its properties.<sup>20</sup> The Sports Complex Special Services District is funded by a contract with the Eagles, the Phillies, and Comcast-Spectator.<sup>21</sup> In Manayunk, the Development Corporation relies heavily on the revenue derived from its control of a municipal parking lot.<sup>22</sup> Sometimes, in other words, only a handful of business entities pay for most of the BID's costs. Moreover, as the studies show, in poorer parts of town, compulsory assessments on commercial property owners do not generate an adequate revenue to pay for needed services.<sup>23</sup> These neighborhoods also lack the sources of income, like sports teams or a municipal parking lot, which other BIDs have. As a result, these BIDs have to work harder to obtain revenue—above all, from the city government. This focus on city funding is ironic. BIDs, after all, are created to provide and pay for services that the city should be providing itself but does not because it lacks the money to do so. Why, one might ask, would one create a BID in a neighborhood where its key revenue-raising device does not work to provide the needed money?

Finally, there is the question of what BIDs are organized to do. Although, as stated earlier, crime reduction and sanitation are high on everyone's list, some BIDs are unable to do much about these problems. They don't have the resources. Other BIDs perform many other functions. Indeed, it seems more accurate to define the task performed by BIDs not in terms of providing supplementary services but as an effort to help local businesses improve their commercial neighborhood environment. To achieve this objective, a BID might focus on zoning changes,<sup>24</sup> on master planning,<sup>25</sup> on traffic

---

20. See Justice, *supra* note 16, at 232.

21. Gainsborough, *supra* note 18, at 156.

22. Flanagan, *supra* note 12, at 147–48.

23. Wheeland, *supra* note 3, at 370–71; Kummerow, *supra* note 18, at 245; Stokes, *supra* note 19, at 335.

24. Christine Kelleher Palus, *There Is No Line: The City Avenue Special Services District*, 3 DREXEL L. REV. 287, 292 (2010).

25. Ruffin, *supra* note 7, at 318–20.

flow,<sup>26</sup> on youth activities and charitable events,<sup>27</sup> or even on establishing a community court and “assisting” homeless people.<sup>28</sup> One of Philadelphia’s most interesting approaches to improving a neighborhood’s business climate is to improve cross-border relationships between a Philadelphia neighborhood and its nearby suburb—characteristic of both the City Avenue Special Services District and the Greater Cheltenham Avenue Business Improvement District.<sup>29</sup> The Aramingo Avenue Shopping District does something similar by seeking to connect two very different Philadelphia neighborhoods.<sup>30</sup> The idea of improving the environment of the commercial neighborhood thus generates a wide variety of possible activities. Hence the importance of the two earlier topics: who makes the decisions about what the BID should do and how these functions are paid for. As the Germantown Study rightly points out, there are many possible choices, even for a narrowly business-focused BID.<sup>31</sup> Should the BID focus on local retail stores or chains, on businesses that attract foot traffic or visitors with cars, on helping liquor stores or limiting them? Given choices such as these, it is important to remember that, in most BIDs, these choices are not made by representatives of neighborhood residents. They are also often not made by the actual businesses in the neighborhood; they tend to be made by tenants rather than property owners. Differences of opinion among the residents, commercial tenants, and property owners on how to allocate revenue would not be surprising—nor would differences of opinion within each of these categories.

### III. THE SEDUCTIONS OF FORM

The variety in Philadelphia along all three key dimensions of the definition of a BID—who decides, who pays the bills, and what tasks are undertaken—raises a central puzzle. Why have all these very different neighborhoods, with different resources and different actors, all adopted the same legal structure? Perhaps one explanation is that the Pennsylvania legal system does not offer neighborhoods enough other statutory options to choose from. State law has created the institutional form of a BID, and the City of Philadelphia

---

26. McLeod, *supra* note 15, at 265; Gainsborough, *supra* note 18, at 157.

27. Gainsborough, *supra* note 18, at 165.

28. Morçöl, *supra* note 6, at 281.

29. See Palus, *supra* note 24, at 287–88; Wheeland, *supra* note 3, at 368.

30. Gross, *supra* note 17, at 173.

31. See Stokes, *supra* note 19, at 336–37.

has allowed very different groups of people to use it to tap quite different funding sources to do very different things. To be sure, even now, there are alternatives. The University City Improvement District, for example, is not a BID. It is a non-profit corporation, run jointly by the neighborhood's universities and its residents, with income derived from grants and from the universities rather than from assessments.<sup>32</sup> This non-profit corporation performs BID-like tasks, like dealing with crime and grime, but also works on capital improvements.<sup>33</sup> It is, however, responsible to a very different constituency than are most BIDs.

University City's alternative structure is not useful in the poorer neighborhoods that lack major non-profits like universities. What are their options? It used to be that a conventional answer would be neighborhood government—that is, an elected, democratically-responsible institution designed to provide services and improve neighborhood life.<sup>34</sup> Nowadays, however, at least in Philadelphia, this does not appear to be a live option. Instead, there seems to be an almost automatic answer when one seeks to create an organization to improve neighborhood life: Let's create a BID. The problem with this automatic instinct is that such a model might empower the wrong people to tap the wrong resources to do the wrong things. I think we need more options. As the Germantown study says, "cities need to find a more sustainable financing model for localized place management . . ." <sup>35</sup> One way to start on this task would be for the state government to pass authorizing legislation that establishes more models—including more democratic models—that would allow Philadelphia's neighborhoods to work on the improvement of their community in a variety of different ways.

---

32. See Thomas J. Vicino, *New Boundaries of Urban Governance: An Analysis of Philadelphia's University City Improvement District*, 3 DREXEL L. REV. 339, 345 (2010).

33. See *id.* at 339–40.

34. See generally, MILTON KOTLER, NEIGHBORHOOD GOVERNMENT: THE LOCAL FOUNDATIONS OF POLITICAL LIFE (1969) (explaining the organizational and political structure of neighborhood movements).

35. Stokes, *supra* note 19, at 337.