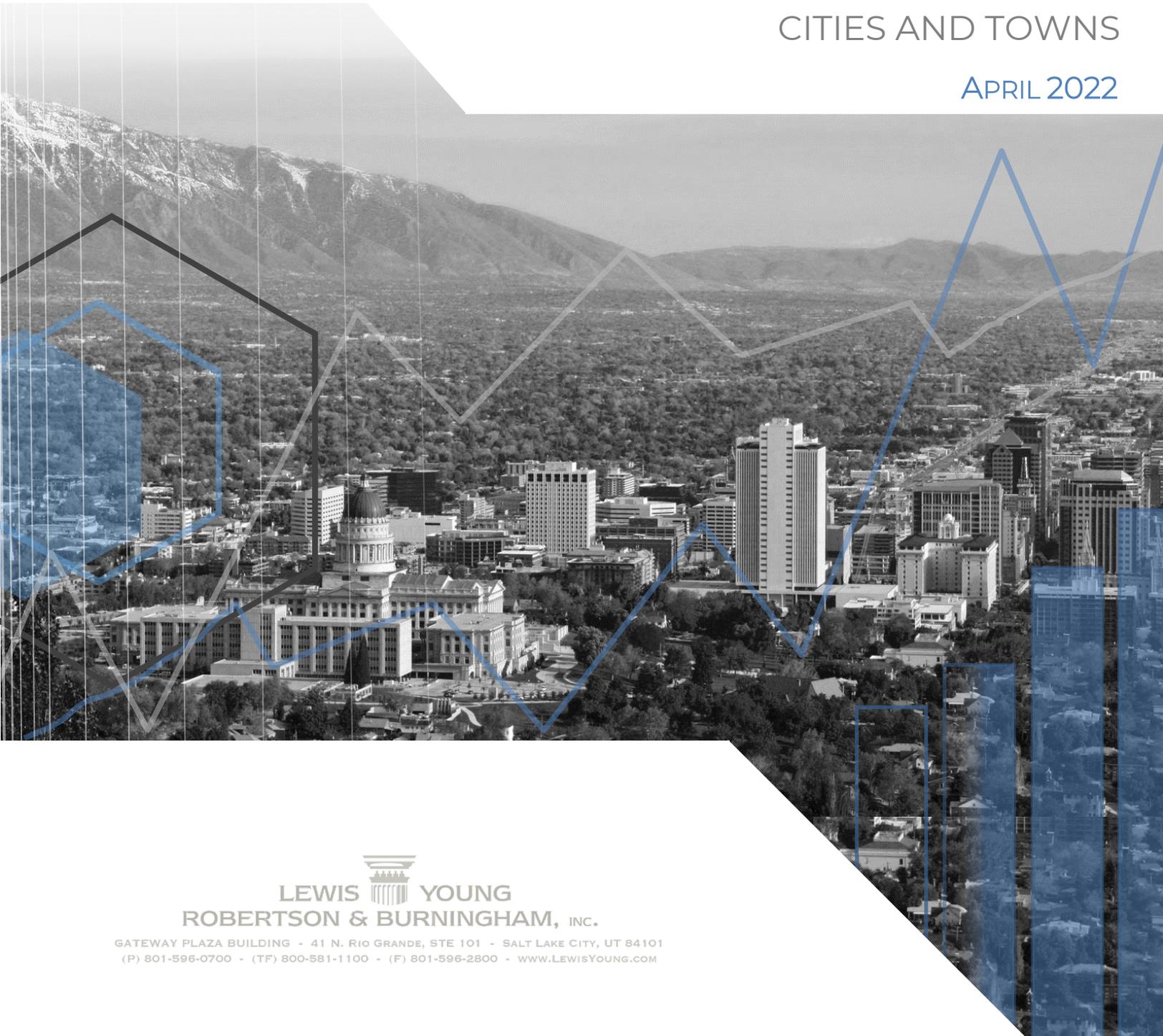


RETAIL FACILITY  
INCENTIVE PAYMENTS AMENDMENTS  
**HB 151 WHITE PAPER**

UTAH LEAGUE OF  
CITIES AND TOWNS

APRIL 2022



  
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# WHITE PAPER OVERVIEW

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Lewis Young Robertson & Burningham, Inc. (“LYRB”), working closely with the Utah League of Cities and Towns (“ULCT”) during the 2022 General Legislative Session, was asked to draft a white paper summarizing **House Bill 151: Retail Facility Incentive Payments Amendments**, which was significantly discussed and debated during the 2022 General Session. The bill’s Sponsor was Representative Mike Schultz and the Floor Sponsor was Senator Evan Vickers.

HB 151 was enacted by the Utah Legislature and later signed into law by the Governor, which modified and amended UCA 11-41 – Prohibition On Retail Facility Incentive Payments Act.

This White Paper will address the following:

## Bill Summary and Highlighted Provisions

An overview of the bill and major provisions enacted.

## Background

A brief background of the bill and the purposes surrounding the need for the legislation and desired outcomes.

## Changes introduced by the Bill

The bill changes existing legislation (UCA 11-41 – Prohibition On Retail Facility Incentive Payments Act) regarding retail facility incentive payments. This section goes over the changes in detail.

## Impact and Potential Consequences of Amendments

This section looks at expected and potential impacts as a result of the changes introduced by HB 151, as it is incorporated into UCA 11-41 – Prohibition On Retail Facility Incentive Payments Act.

## HOUSE BILL 151 SUMMARY AND HIGHLIGHTED PROVISIONS

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### LEGISLATION SUMMARY

House Bill 151 (HB 151) amends provisions relating to incentive payments for retail facilities, prohibiting municipalities from offering retailers and developers incentives to locate a store in that municipality's boundaries. HB 151 amends certain provisions codified in UCA 11-41 – Prohibition On Retail Facility Incentive Payments Act.

### HIGHLIGHTED PROVISIONS

Key provisions and requirements of HB 151 are:

- i. The definition of certain key terms, including:
  - a. A "**public entity**" is defined in the bill as a political subdivision of the state; state agency, higher education institution, Military Installation Development Authority, the Utah Inland Port Authority, Point of the Mountain State Land Authority
  - b. A "**retail facility incentive payment**" means a payment of public funds to a person by a public entity for the development, construction, renovation, or operation of a retail facility within an area of the state; and in the form of a payment; rebate; refund; subsidy; or any other similar incentive, award, or offset.
- ii. HB 151 prohibits a public entity from making, or entering into an agreement to make, certain incentive payments related to retail facilities after a specified date, with specified exceptions;
  - a. The bill *does not* prohibit the payment of public funds for the development, construction, renovation, or operation of:
    - i. public infrastructure; or
    - ii. a structured parking facility;
    - iii. the demolition of an existing facility;
    - iv. assistance under a state or local: main street program; or historic preservation program;
    - v. environmental mitigation or sanitation, if determined by a state or federal agency under applicable state or federal law;
    - vi. assistance under a water conservation program or energy efficiency program, if any business entity located within the public entity's boundaries or subject to the public entity's jurisdiction is eligible to participate in the program;
    - vii. emergency aid or assistance, if any business entity located within the public entity's boundaries or subject to the public entity's jurisdiction is eligible to receive the emergency aid or assistance; or
    - viii. assistance under a public safety or security program, if any business entity located within the public entity's boundaries or subject to the public entity's jurisdiction is eligible to participate in the program.
- iii. Requires a public entity that makes certain payments related to retail facilities during a fiscal year to submit a report or notification to the Governor's Office of Economic Opportunity (office);
- iv. Requires the office to review a public entity's report to determine whether certain incentive payments comply with this the legislation;
- v. Allows a public entity to appeal a determination by the office that certain incentive payments had been made in violation of this legislation;
- vi. Allows the office to notify the state auditor after a specified date if a public entity fails to submit a report or fails to make efforts to recoup misused funds within a certain time;

- vii. Allows the state auditor to initiate an audit or investigation if the state auditor receives notice from the office regarding a public entity; and makes technical and conforming changes.

## BACKGROUND

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This bill represents a major shift in the economic development philosophy as practiced in the State of Utah. The philosophy behind HB 151 is that offering incentives to developers, specifically retail developments, drives up the price of real estate and creates “winners” and “losers” in the marketplace. Some communities with large retail developments benefit at the expense of other communities that have smaller, more limited retail developments. The idea that retail demand is limited by proximity, number of residents (roof-tops), etc. makes the argument that demand is limited, and some communities are taking a disproportionate share of the regional retail demand. More critical is the concept that retail development occurs naturally with adequate residential development and is a “zero-sum game” related to local municipalities. Many legislators and other stakeholders approached this legislation from the perspective that retail incentives are simply unnecessary and create no new net economic development.

Initially, UCA 11-41 prohibited “big box” stores and car dealerships from receiving sales tax incentives, but further discussion and debate led to the perceived need to expand the prohibitions to all retail (except for certain exempted purposes). In addition to the prohibition of sales taxes it was expanded to include any payment, incentive, resource, etc. (defined as a retail incentive payment) as well.

### RETAIL INCENTIVES

Local governments are dependent on sales and use taxes to support general fund operations and services.

- A sales tax revenue distribution system based on population and point of sale creates a desire for local governments (cities, towns, and counties) to incentivize or induce retail activity within smart-growth oriented land use planning.
- Because sales tax revenues provide operating funds for cities and towns, and a portion of sales tax revenues are disbursed according to the point of sale, there is a strong desire by local governments to have retail stores locate within their geographic boundaries.
- In particular, local governments pursue retailers such as “big box” stores and car dealerships that tend to generate large amounts of sales tax revenue, which is critical to financially support the key public services needed to sustain communities.

### WINNERS AND LOSERS

However, once a retailer has chosen a general area in which to locate, based on their internal criteria, some believe it does little good overall to fight over which particular city’s jurisdiction the store ends up in. When cities compete against each other for retail stores, retailers are able to play cities against each other in order to garner the most lucrative incentive in what amounts to a bidding war. In the end, the developer and/or retailer get more money than they otherwise would for building something they already determined to be a lucrative endeavor (the “winners”), and the citizens end up paying higher taxes to fund these incentives (the “losers”).

### A UNIFIED EFFORT

The Unified Economic Opportunity Commission, created in the 2021 session by the Governor’s Office of Economic Opportunity (GOEO), looked at ways to reduce economic incentives offered by local governments for businesses to locate in Utah and reduce incentives overall. Similarly,

the Legislature gave direction to reign-in the way incentives were handled at both the state and local levels. HB 35 addresses the state-level issues and HB 151 addresses the local-level issues.

During committee hearings and floor debates, it was noted several times the large number of hours spent in creating this bill which includes many compromises from both sides, for and against retail incentives. In-lieu of modifying the state's sale and use tax distribution formula for local governments, HB 151 is an alternative to dissuade public entities from incentivizing retail developments (except for certain purposes).

## CHANGES INTRODUCED BY HOUSE BILL 151

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HB 151 eliminates all retail incentives and then adds some exceptions back in to allow for limited, special circumstances.

### EXCEPTIONS

Recognizing that there are still valid reasons and circumstances in which offering a public incentive for a retail facility, the following exceptions were created:

- Census tract areas where the median income is below 70% of the state average may participate
  - More than 51% of the residents must be at or below 70%
  - The retail facility must be located entirely within that census tract
- If a community is willing to add in a housing component to the project, creating a mixed-use development, then an incentive may be allowed, provided:
  - the development must include at least one housing unit for every 1,250 square feet of retail space within the development; and
  - at least 10% of the new or proposed housing units within the development qualify as moderate-income housing, in accordance with the moderate-income housing plan of the municipality or county in which the development is located
- 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> class counties may still participate and use public funds to incentivize and promote retail activity
- Facilities for small business and Utah-based non-profits are exempt

### REPORTING REQUIREMENTS

The bill also creates reporting requirements for each year that a public entity makes a retail incentive payment. Reports must be submitted to the Utah State Auditor. The reports must list:

- the type of retail facility incentive payment;
- the date on which the retail facility incentive payment was made; and
- identification of the recipient of the retail facility incentive payment;
- include any other information requested by the office; and
- be in a form prescribed by the office

### VIOLATION AND PENALTIES

The Auditor will send a written notice to the public entity if the office determines there is a substantial likelihood that the public entity made a retail facility incentive payment in violation of the prohibitions on retail facility incentives (Section 11-41-103).

- The public entity may appeal the decision
- If not, the office determines that the public entity has failed to make efforts to recover or

recoup the amount of public funds lost to the state as a result of the violation within 90 days after the day on which the notice is sent

## IMPACT AND POTENTIAL CONSEQUENCES OF AMENDMENTS

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The largest impact of HB 151 is that it prohibits and eliminates any public funds from being used to incentivize, support, or induce retail business activity as defined in the bill.

### **SIGNIFICANT REDUCTION IN DEVELOPERS AND RETAILERS SEEKING TO NEGOTIATE INCENTIVES FOR RETAIL ACTIVITY**

HB 151 prevents businesses that have decided to locate in an area in Utah from being able to “city shop” and play them against each other to get the highest public incentive possible. Cities will no longer drive the price or expense of public incentives by “bidding” against each other in pursuit of retailers landing in their jurisdiction. Cities that have built a large retail tax base have the resources to place strong bids and further accumulate more of the regional retail demand at the expense of their smaller neighbors. This creates “sales tax leakage” where residents of these smaller communities must give their sales tax dollars to their neighboring cities instead of their own city to acquire the goods and services they require.

### **SALES TAX INEQUITIES**

As stated earlier, part of Utah’s sales tax distribution formula is geographically based. Fifty percent of a city’s sales tax is based on point of sale and the other half is based on the city’s population relative to the total state’s population. HB 151’s proponents argue that the legislation is intended to alleviate some of the inequities of the 50/50 sales tax distribution model that the state employs. These amendments to UCA 11-41 are a compromise in lieu of revising the sales tax distribution model. Based on market analysis and surveys related to retail development activity, it is still believed that there will exist inequities between communities with more than their share of retail sales tax activity and communities that are “bedroom communities” that leak retail demand to other regional locations.

### **BROWNFIELD DEVELOPMENT**

The bill has provisions for environmental cleanup and demolition where applicable, if determined by a state or federal agency under applicable state or federal law. This may result in brownfield redevelopment being a more attractive idea to developers.

### **HOUSING AND “SMART-GROWTH” PLANNING DEVELOPMENT CONSIDERATIONS**

Similarly, HB 151 allows some retail incentives if there is a housing component to the development, which may have the intended effect of creating even greater interest in mixed-use development among both private and public entities. At least 10% of the housing units need to be moderate income housing as per the city’s moderate income housing plan and the incentive can only go toward that housing component.

Additionally, when the focus of development is shifted away from the pursuit of retail and sales tax revenue, cities are better able to pursue smart growth land-use planning and development.

## APPENDIX – HOUSE BILL 151

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The following hyperlink will access House Bill 151 on the Utah State Legislature's website:

[HB0151 \(utah.gov\)](http://utah.gov)