

October 20, 2023

Mr. George Koczwar
Village Manager
Village of Orland Park
14700 Ravinia Avenue
Orland Park, Illinois 60462

re: Village of Orland Park Main Street Triangle TIF District Payments to Orland School District 135 and Consolidated H.S. District 230

Dear George;

This is in response to your request for our legal review of the April, 2023 letters from Orland School District 135 and Consolidated H.S. District 230 ("School Districts") requesting tuition reimbursements and payments of surplus funds from the Main Street Triangle TIF District, pursuant to a 2007 intergovernmental agreement with the Village ("IGA").

The main provisions of the IGA are the following:

- The School Districts will not challenge the TIF as amended;
- No transfer of Incremental Revenues from the Main St. TIF to another TIF;
- No further expansion of the TIF in duration, area, or in estimated project costs;
- "Surplus Funds" shall mean "Incremental Revenues" as defined in the TIF Act, and shall be distributed to the taxing districts each year;
- Surplus Funds will be not less than \$163,677 in TIF years 19-23 (year 19 is 2023);
- Village will contribute \$818,383¹ in sales tax revenues to the TIF allocation fund over the life of the TIF, and will be distributed as surplus;
- Final distribution of Incremental Revenues will be declared Surplus Funds when all Project Costs and debt have been paid, and will then be distributed immediately;

¹ \$163,677 for years 19-23 totals \$818,383.

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- Village will deposit any proceeds from the Village's sale of any Main Street TIF land, and any Metra grant money in the special allocation fund for expenditure on eligible project costs with any remaining amount distributed as Surplus Funds;
- The School Districts will be reimbursed for the annual educational operational costs of the students enrolled in the district and residing within the TIF district, equal to the per pupil cost, upon presentation of documentation as required under the statute.
- The IGA is governed by the laws of the state of Illinois.

There are two claims made by the School Districts in their correspondence to the Village. The first relates to annual per capita tuition reimbursement for new students residing in the School Districts and the redevelopment project area, and the second relates to the distribution of surplus funds in the special tax allocation fund.

Applicable Legal Principles

A. Intergovernmental Agreements and TIF.

Intergovernmental agreements with are authorized under Article VII, Sec. 10 of the Illinois Constitution and the Intergovernmental Cooperation Act (5 ILCS 220/1, *et seq.*, and contracts with overlapping taxing bodies necessary or incidental to the redevelopment project are specifically contemplated and permitted under Sections 74.4-3, 4-4(b) and 4-5(d)(10) the TIF Act. It is not uncommon for such TIF-related intergovernmental agreements to include commitments from a developer to pay taxing districts' impacts from sources other than TIF, for the municipality to make payments in lieu of taxes, for the municipality to limit the amount of increment available to the developer, or for the municipality to declare a surplus of increment to be paid to the various taxing districts.

B. Tuition Reimbursements.

Section 74.4-3(q)(7.5) of the Act (65 ILCS 5/11-74.4-3(q) (7.5)) provides schools with a right to property tax increment produced by residential units that are in the redevelopment project area and are receiving TIF-funded assistance (or where the municipality is installing TIF-funded infrastructure to serve residential units). In those instances, school districts can receive a total of up to 25 percent of the increment in most cases and up to 40 percent in some cases, depending on the type of school district and the formula set forth in the TIF Act. This is potentially an annual cash payment to the school districts for the cost of educating new students (i.e., per capita tuition costs less state aid) enrolled in the school district and residing in such housing units in the redevelopment project area. Payment of TIF funds for educational operations under 74.4-3(q)(7.5) is forfeited by the school district(s) if, after July 1 and before September 30 of each year, the school district(s) fail to make a claim and provide the municipality with reasonable evidence to support its claim for reimbursement.

C. Distribution of Surplus Funds

Under Section 74.4-7 of the TIF Act, incremental revenues “not required, pledged, earmarked, or otherwise designated for payment and securing of obligations and anticipated redevelopment project costs” including annual public debt payments and interest referenced in the Village TIF Ordinance, calculated *annually*, are considered “surplus” that has to be distributed proportionately to the affected taxing districts. “Surpluses” are to be distributed annually, without the need for claims by the affected taxing district. Then under Section 74.4-8 of the TIF Act, once all TIF Projects Costs and debt have been paid, the TIF is to be closed out, and any amounts remaining in the special allocation fund are considered surplus and must be distributed proportionately to the affected the taxing districts.

Section 74.4-7 is detailed as to the mechanics of the annual surplus distributions. Surplus funds shall be distributed to the taxing districts and to the Illinois Department of Revenue within 180 days after the close of the municipality's fiscal year. The distribution is to be made by the municipal treasurer to the Illinois Department of Revenue, the municipality, and the county collector. Distributions are made first to the Department of Revenue and the municipality in direct proportion to the tax increment revenue received from the state and the municipality (but not to exceed the total received from either source less any annual surplus distributions theretofore made). Any remaining funds are then paid to the county collector, who remits them to the affected taxing districts *in the same manner and the same proportion* as the most recent distribution of real property taxes from real property in the redevelopment project area.

Under Section 74.4-7 of the TIF Act, municipalities may pledge other municipal taxes, debt and/or revenues to pay for TIF Fund obligations for the period of the TIF Fund obligations not exceeding 20 years; and the pledge needs to be established in the TIF Ordinance. This rule applies to home rule municipal obligations as well as non-home rule municipal obligations.

The TIF Act also contemplates intergovernmental agreements with taxing districts by including all or a portion of a taxing district's *capital costs resulting from the redevelopment project necessarily incurred or to be incurred within a taxing district in furtherance of the objectives of the redevelopment plan and project* as TIF-eligible redevelopment project costs (Section 11-74.4-3(q)(7); and also authorizes municipalities to make “payments in lieu of taxes” (i.e., lost revenues due to the municipality’s acquisition of property in the redevelopment project area) as TIF-eligible expenses that can be paid out of the special tax fund, but only if such payments are made to all districts within a project redevelopment area on a basis which is proportional to the current collections of revenue which each taxing district receives from real property in the redevelopment project area. (Section 11-74.4-3(m) and 11-74.4-4(l) In *Henry County Board v. Village of Orion*, 278 Ill. App. 3d 1058, 663 N.E. 2d 1076 (3d Dist. 1996), the court rejected the argument that an intergovernmental agreement with one of the taxing districts was authorized under Section 74.4-3(q)(7), instead relying upon the mandate that payments in lieu of taxes by a municipality must be provided to all affected taxing districts as provided in the statute. Any intergovernmental agreement executed by a municipality for the express purpose of

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paying taxing districts for lost tax revenues must provide for such payment to all affected taxing districts, or it is not valid. The *Orion* court's ruling is supported by subsequent legislative amendments to the Act.

The School Districts' Claims for Tuition Reimbursements.

The School Districts' claims for tuition reimbursement are significant - \$1,099,449.92 to School District 135, and \$1,435,092.65 to Consolidated High School District 230. However, the two School Districts forfeited their claims to these moneys.

The School Districts each fashion their claim as a "catch-up payments" for what would have been collected had they made their requests annually. The IGA specifically states that the School Districts will be reimbursed for the annual educational operational costs of the new students, as limited under Section 74.4-3(q)(7.5) of the TIF Act, which requires an annual request at a specific time with supporting documentation. Both School Districts failed to make annual requests and failed to present documentation supporting annual requests, and therefore forfeited any such claims.

The Village's payment of the claims now – contrary to the statute and the IGA – would expose the Village to claims of unlawful preference to any surplus distributions owing to other taxing districts. The School Districts' tuition claims do not comply with the statute or the IGA, and therefore must be denied.

The School Districts' Claims for Special Tax Fund Distributions

In this case the School Districts' claims for annual and final surplus distributions requires a careful assessment of the Act, the IGA, and the performance of the TIF. The requirements under the Act are not the same as those under the IGA. The Act requires the deposit of property tax incremental revenues into the special tax fund, for payment of TIF-eligible expenses and annual and final distribution of surpluses.

The distributions of special tax funds called for under the IGA are neither payments in lieu of taxes nor payments limited to the School Districts' capital costs within the redevelopment project area. Therefore, the distributions of special tax funds called for under the IGA are not TIF eligible redevelopment project costs.

Furthermore, the IGA requires that revenues/funds other than TIF increment be deposited in the special allocation fund for distribution – some after payment of TIF eligible project costs, and some as "surplus" regardless of whether TIF eligible project costs have been paid. Specifically, the IGA requires deposit of \$818,383 in sales tax revenues into the special tax fund, plus Metra grants, plus the proceeds from any Village sale of land it acquired with TIF revenue. The IGA says that the proceeds from the Metra grant and any land sale are to be used first for project costs, and then distributed as surplus if there is any. However, under the IGA the sales tax revenues are to be deposited in the special tax fund, but are not to be used for TIF-eligible project costs – rather these funds can only be declared a "Surplus." While Section 74.4-7 of the TIF Act authorizes municipalities to *pledge* other municipal taxes, debt and/or revenues to pay

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for TIF Fund obligations, the authority to pledge such other revenues for TIF fund obligations does not affect the municipal obligations to apply funds in the special tax fund per the Act, i.e., pay project costs and distribute surplus. Finally on this point, the pledge of other non-TIF revenues must be established in the TIF Ordinance, and there is no such pledge in the TIF ordinance here.

Section 74.4-7 of the TIF Act no doubt permits municipalities to pledge in the TIF ordinance *all or any part* of the funds in and to be deposited in the special tax allocation fund to the payment of the redevelopment project costs and obligations, with any excess to be distributed as surplus. (Section 11-74.4-7) In other words, the municipality may cap reimbursement of redevelopment project costs. But there is no legal authority we could find that authorizes municipalities to establish classifications of funds deposited in the special tax fund, i.e., establish some of the funds as TIF-eligible project costs, and other revenues as surplus, before any such cap is reached.

Finally, we have reviewed the annual audits for this TIF. TIF-eligible costs and expenses, and debt obligations, far exceed revenues of all sources deposited in the special tax fund. There has never been a surplus shown in in any year's audit, and there is no surplus now. Even if \$818,383 in general municipal sales taxes were deposited in the special tax fund, there would still be a significant deficit. As such, there cannot be a distribution of surplus to either of the School Districts, or any other affected taxing districts.

As held in the *Orion* decision, the provisions of the Act trump the IGA. The Village of Orland Park must comply with the Act, and therefore no distribution may be made at this time as "surplus." And should there be a year-end or close-out surplus in the future, such surplus must be distributed proportionately to all affected taxing districts.