



## MEMORANDUM

TO: Board of Directors  
Brownfield Redevelopment Authority of the City of East Lansing

FROM: Miller Canfield

RE: Issues related to Refunding of Brownfield Redevelopment Authority of the City of East Lansing Limited Obligation Tax Increment Revenue Bond, Series 2017 (Taxable)

DATE: October 22, 2020

---

In 2017, the Board of Directors (the “Board”) of the Brownfield Redevelopment Authority of the City of East Lansing (the “Authority”) issued the Limited Obligation Tax Increment Revenue Bond, Series 2017 (Taxable) (the “2017 Bonds”) pursuant to: (1) the Authority’s Center City District Brownfield Plan No. 24 (the “Plan”); (2) the (a) East Lansing Center City Master Development Agreement, dated as of October 31, 2017 (the “Original Agreement”), by and between the Authority, City of East Lansing (the “City”), the Downtown Development Authority of East Lansing and HB BM East Lansing LLC (the “Developer”), as amended by (b) the First Addendum to Master Development Agreement on December 5, 2017 (the “First Addendum”), and (c) the Second Addendum to Master Development Agreement and Clarification of Master Lease (the “Second Addendum,” and together with the Original Agreement and the First Addendum, the “Development Agreement”); (3) a (a) Resolution of the Board of the Authority Authorizing the Issuance and Delivery of Limited Obligation Tax Increment Revenue Bonds and Providing for Other Matters Relating thereto (the “Original Resolution”), and (b) and a Supplemental Resolution of the Board of the Authority Authorizing the Issuance and Delivery of limited Obligation Tax Increment Revenue Bonds and Providing for Other Matters Relating thereto (the “Supplemental Resolution”); and (4) a Trust Indenture between the Authority and The Huntington National Bank, as Trustee, Relating to \$25,265,000 Limited Obligation Tax Increment Revenue Bond, Series 2017 (Taxable) (the “Indenture”).

Proceeds of the sale of the 2017 Bonds were used to pay (1) the costs of certain public improvements and a parking garage (the “Project”) for the Center City development (the “Development”), and (2) the costs of issuance of the 2017 Bonds.

On September 24, 2020, the Board approved a Resolution Authorizing the Issuance of and Delivery of Limited Obligation Tax Increment Revenue Refunding Bonds and Providing for Other Matters Relating thereto (the “Refunding Resolution”), authorizing the issuance of the Authority’s Limited Obligation Tax Increment Revenue Refunding Bonds, Series 2020 (the “Refunding Bonds”), in one or more series, for the purpose of paying or reimbursing additional costs of the Project; refunding the 2017 Bonds (including accrued interest thereon), including the

payment of accrued and capitalized interest on the Refunding Bonds and funding of a debt service reserve fund, and the payment of related legal and financing fees and expenses such as bond discount, and other expenses incidental to the financing.

Questions have recently been raised as to proper payment of the costs of the Project with the Tax Increment Revenues, the issuance of the 2017 Bonds, including the payment of the costs of issuance thereof, and the issuance of the Refunding Bonds, including the payment of the costs of issuance thereof.

Those broad questions follow, together with a description of the relevant contractual and legal authorities and actions taken to approve (an “Approval”) the transactions surrounding the Development.

**1. What eligible activities did the City and the Board authorize to be paid from the Tax Increment Revenues? Can any costs other than the Eligible Activities contained in Column 2 be paid from Tax Increment Revenues?**

On June 20, 2017, the City Council approved the Plan and, immediately thereafter, the Original Agreement.

In recent months, there have been certain assertions made, in particular by former East Lansing Mayor Mark Meadows, that the City Council resolution that approved the Plan limited the Eligible Activities that could be paid by the Tax Increment Revenues to those listed on Exhibit N, Scenario A, Column 2 of the Original Agreement.

The explicit language of the Council resolution, the timing and the method of the approval of the Original Agreement, and the explicit language of the Original Agreement do not support this assertion.

First, the Council resolution states:

Only the expenses that are detailed in an approved Master Development Agreement Exhibit N “City Approved Eligible Activities” shall be financed with Brownfield Revenue Bonds payable solely from the pledged tax increments revenues from the Eligible Property and payment of those bonds will be the only eligible expenses to be reimbursed for Brownfield Plan #24.

The Council resolution contains a vague reference to Exhibit N “City Approved Eligible Activities” and does not contain any language limiting the application of Tax Increment Revenues to \$50,218,825. The referenced Exhibit N actually contains two columns, with one describing eligible activities totaling \$50,218,825, with no eligible activities to be conducted on Grand River, and one describing eligible activities totaling \$55,952,038, with eligible activities to be conducted on Grand River.<sup>1</sup> The Council resolution’s reference to Exhibit N does not distinguish which column of eligible activities it was approving.

---

<sup>1</sup> The designation of the approved Eligible Activities (Scenario A, Column 2) is actually contained in the Original Agreement – not in the Council resolution.

There was also an assertion that “Per the Development Agreement and the adopted Brownfield TIF plan, no tax increment is available to pay any of the expenses detailed in the Bond Issuance Fund. The TIF plan is limited to paying for the BRA Project Fund plus interest.”

There is no language in any Development-related document nor Approval that supports this assertion.

Conversely, all of the language in the Development Agreement and the Plan support the capture of Tax Increment Revenues in excess of \$50,218,825, and the application of those Tax Increment Revenues to the payment of the 2017 Bonds.

The Original Agreement provides:

The bond proceeds will be used to pay for the costs of the eligible activities set forth in Column 2, Scenario A of Exhibit N, (the “City Approved Eligible Activities”). The net proceeds from the BRA Bonds shall not exceed \$24,389,518. For purposes of this Agreement, net proceeds shall be equal to the par amount of the Bonds, plus any original issue premium, less any original issue discount, less costs of issuance (including underwriter’s discount), less any bond proceeds allocated to capitalized interest (for a period of not more than 36 months), and less any bond proceeds deposited into a debt service reserve fund (in an amount not more than 1.25 times maximum annual debt service on the Bonds).

Original Agreement, Section I(b)(8), pg. 9 (emphasis added).

Proceeds from the sale of the Bonds shall be used for the planning, design, financing and construction of the City Approved Eligible Activities, funding a debt service reserve fund, paying capitalized interest and paying costs related to the issuance of the Bonds.” Original Agreement, Section I(b)(8), pg. 12 (emphasis added)

The Original Agreement further states: “Notwithstanding any provision to the contrary in this Agreement or in Brownfield Plan #24, the maximum amount of tax increment revenue that may be captured is \$55,952,038.” Original Agreement, Section I(b)(8), pg. 11 (emphasis added).

Further, a review of the meeting minutes from the June 27, 2017 Council meeting shows that the Development Agreement was approved minutes after the Plan was approved. During the discussion of the Original Agreement, Mr. Meadows offered specific line item amendments to specific provisions in the Original Agreement and its Exhibits (most notably the Parking Agreement), and the Council approved the Original Agreement as so amended (See Approved Minutes, Regular Council Meeting, June 20, 2017). No amendments were offered to limit the use of Tax Increment Revenues to \$50,218,825.

### *2017 Bond Approvals*

During the approval by the City and the Authority of the Development and the 2017 Bonds, Mr. Meadows also served as a member of the Board of the Authority. In this capacity, Mr. Meadows affirmatively voted for the Original Resolution, the Supplemental Resolution, the Brownfield Bonding and Reimbursement Agreement and the Indenture – all of which contain

authorizations that contradict the assertion that only \$50,218,825 of Column 2 Eligible Activities were approved by Council to be paid with Tax Increment Revenues.

From The Original Resolution:

WHEREAS, **the Bonds shall be issued in anticipation of and payable by the Authority solely from the tax increment revenues** generated by the Property pursuant to the Brownfield Plan (the “**Tax Increment Revenues**”), and the Bonds shall not represent a general obligation of the Authority or the City, and will not constitute or give rise to any pecuniary liability or charge against the general credit of the Authority or the general credit or taxing powers of the City, and will not constitute an indebtedness of the City within any constitutional, statutory or charter limitation; and

WHEREAS, the Board has determined that it is in the best interests of the Authority to issue its Limited Obligation Tax Increment Revenue Bonds in an amount not to exceed an aggregate principal amount of \$31,000,000 **to pay costs of the Project, to pay the costs of issuance of the Bonds, to fund a debt service reserve fund (if any) for the Bonds, and to pay capitalized interest** (if any) related to the Bonds; and

Original Resolution, Recitals (emphasis added). The recitals do not specify that only the portion of the 2017 Bonds that are funding the Project Fund deposit will be paid for with Tax Increment Revenues.

The Original Resolution continues:

1. ... the Board hereby authorizes the issuance, execution and delivery of the Bonds in one or more series to be designated Brownfield Authority of the City of East Lansing Limited Obligation Tax Increment Revenue Bonds, Series 2017A and/or City of East Lansing Limited Obligation Tax Increment Revenue Bonds, Series 2017A (Federally Taxable), provided that the aggregate principal amounts of Bonds issued shall not exceed Thirty One Million Dollars \$31,000,000 ... The Bonds shall be dated as of the closing on the Bonds, and shall be issued for the purpose of providing funds which, together with other available funds, will be used to (i) pay for the Project, (ii) pay the costs of issuance of the Bonds, (iii) fund a debt service reserve fund (if any) for the Bonds in an amount determined by an Authorized Officer, and (iv) pay capitalized interest (if any) related to the Bonds in an amount determined by an Authorized Officer.

Original Resolution, Section 1 (emphasis added).

3. The Bonds shall be issued in anticipation of and payable from Tax Increment Revenues pursuant to the Brownfield Plan, which Tax Increment Revenues are anticipated to be in amounts sufficient to pay principal of and interest on the 2017 Bonds. There is hereby created a statutory first lien on the Tax Increment Revenues in favor of the Bonds.

Original Resolution, Section 3 (emphasis added). The description of the security for the 2017 Bonds in the Original Resolution does not limit the application of the Tax Incremental Revenues to the portion of the 2017 Bonds deposited into the Project Fund.

The Original Resolution was approved by the Board 6-0 on October 6, 2017, with Mr. Meadows in attendance and voting for the Original Resolution.

From the Supplemental Resolution

2. Approval of Trust Indenture and Purchase Contract; Delegation. The Trust Indenture in form substantially similar to that on file with the Authority is hereby approved. The Purchase Contract in form substantially similar to that on file with the Authority is hereby approved. The Board hereby delegates the authority to take certain actions on its behalf under the Trust Indenture to the Authority Project Representative (as such term is defined in the Trust Indenture).

Supplemental Resolution, Section 2 (emphasis added). The Purchase Contract was provided to the Board prior to the meeting (see Agenda Package, December 7, 2017, Authority Board Meeting).

Section 5 of the Purchase Agreement, which was provided in advance of the meeting and approved by the Authority Board in the Supplemental Resolution, provides:

5. Issuance of Refunding Bonds. The Issuer hereby acknowledges its intent (i) to refinance the Bonds on or prior to June 1, 2020 or such other date as the parties agree, with refunding bonds secured by the same security as the Bonds and maturing 30 years after the date of such refinance, (ii) to use the proceeds of the refunding bonds to pay the outstanding principal of and accrued interest on the [2017] Bonds, (iii) to issue the refunding bonds in a tax-exempt series and a taxable series, to the extent portions of the Project as completed are eligible for tax-exempt financing and (iv) to use the proceeds of the refunding bonds to pay any other costs or reimbursable amounts as provided for in the Indenture.

Notwithstanding the foregoing, under no circumstances shall the Issuer be responsible for the adequacy of the refunding bond proceeds to pay in full the [2017] Bonds. Furthermore, the parties acknowledge that an underwriter, placement agent or third party (but not the Issuer) will be retained to market and sell the refunding bonds at that time.

Purchase Agreement,<sup>2</sup> Draft as approved by Authority Board, Section 5 (emphasis added). The Supplemental Resolution was approved by the Board 7-0.

---

<sup>2</sup> Generally, a Bond Purchase Agreement for a publicly offered deal expires upon the purchase of the subject bonds. However, because the 2017 Bonds were sold pursuant to a private placement, the Purchase Agreement for the 2017 Bonds includes a survival provision, which states: "All representations and covenants of the Issuer and agreements of the Purchaser set forth in this Agreement shall remain in full force and effect regardless of any investigation, or statement as to the results thereof, made by or on behalf of any purchaser of the Bonds or any person controlling any such purchaser, and shall survive delivery of and payment for the Bonds." Purchase Agreement, Section 7.

### From the Brownfield Bonding and Reimbursement Agreement

The Brownfield Bonding and Reimbursement Agreement, by and between the Authority and the Developer (the “Reimbursement Agreement”) was approved by the Authority Board on September 28, 2017. Mr. Meadows moved for approval of the Reimbursement Agreement and voted for its approval.

The Reimbursement Agreement provides: “Pursuant to the terms of the Master Development Agreement, the maximum amount of Tax Increment Revenues that may be captured with respect to the Property is limited to \$55,952,038.” Reimbursement Agreement, Recital E (emphasis added).

Further, “The Master Development Agreement sets forth the terms and conditions under which Tax Increment Revenues will be used to pay the debt service on the Bonds and, under certain circumstances, reimburse the Developer for certain expenses. The terms of the Master Development Agreement are incorporated into this Agreement.” Reimbursement Agreement, Section 6 (emphasis added).

### From the Indenture

Mr. Meadows was in attendance and voted to approve the Indenture, which was provided in the Agenda package in substantially final form in advance of the Authority December 7, 2017 Board meeting.

“Section 502. Security for Bonds. The Bonds shall be secured only by the following (the ‘Security’):

1. All moneys in the Bond Fund;
2. The Tax Increment Revenues; and
3. All Investment Income derived from moneys in the Bond Fund.”

Indenture, Section 502. The description of the security for the 2017 Bonds does not limit the application of the Tax Increment Revenues to the portion of the 2017 Bonds deposited into the Project Fund. All of the 2017 Bonds are secured by and payable from the Tax Increment Revenues, among other things.

### *Ruth Beier and Alice Dreger Email Exchange Acknowledging 2020 Refunding*

There was broad understanding in 2017 of the specific details regarding the issuance of the 2017 Bonds and the contemplated 2020 refunding, as evidenced by an email exchange between Ruth Beier and Alice Dreger.

This exchange clarifies that it was always known that insufficient tax increment revenues would have accrued to begin paying debt service on the 2017 Bonds, that the accrued interest on the 2017 Bonds would be paid from the refunding bonds, and that all of the debt service on the 2017 Bonds is paid from Tax Increment Revenues. *See* email between then-City Councilperson Ruth Beier and *East Lansing Info* blogger Alice Dreger, as forwarded to the BRA Board, entitled

“convo from 2017 with Ruth about the bonds.” This exchange occurs in that message (with emphasis added):

On Dec 10, 2017, at 5:06 PM, Beier, Ruth <[RBeier@mea.org](mailto:RBeier@mea.org)> wrote [To A. Dreger]:

**I don't think you understand. No TIF will have accrued by 2020. But, the project will be finished and TIF revenue will start to come in.** In 2020 the bonds will be sold like revenue bonds - will you pay me \$x now to receive \$y per year for the next 30 years, where the sum of all y = original price plus interest. If investors don't agree, the price x will fall and the developer will lose.

At this point, I am confident that the city is not at investment risk. The developer has all of the investment risk.

Sent from my iPhone

---

On Dec 10, 2017, at 4:06 PM, "[alicedreger@gmail.com](mailto:alicedreger@gmail.com)" <[alicedreger@gmail.com](mailto:alicedreger@gmail.com)> wrote:

Ruth,

Look at his answer: **“You are correct redemption ( both principal and accrued interest) can only be paid from refunding bond proceeds and captured tax increments if any.”**

Refunding bond proceeds is named 3x as how we pay back if no TIF accrues by 2020.

How do we refund if no one will but a non recourse bond at that point, just like no one but Scottsdale will at this point?

Does the BRA simply default in that case? Or does it have to use some other bonding approach to take all means necessary, as the agreement states?

If the BRA just defaults and we can't get sued, fine.

Alice

#### *Costs of Issuance – Statutory Authority*

The payment of costs of issuance of bonds issued under Act 381, Public Acts of Michigan, 1996, as amended (“Act 381”) from the proceeds of the bonds is statutorily authorized by the Act and by the Revised Municipal Finance Act, Act 34, Public Acts of Michigan, 2001, as amended (“Act 34”).

Specifically, Section 7 of Act 381 authorizes a brownfield authority to “incur costs in connection with the performance of its authorized functions, including but not limited to, administrative costs and architect, engineer, legal or accounting fees.” MCL 125.2657(1)(h). Further, a brownfield authority may finance those activities with “proceeds of tax increment bonds and notes issued under section 17.” MCL 125.2661(c)(ii).

Costs of issuance of brownfield bonds are not included as a separate item in the definition of eligible activities, but the payment of principal of and interest on brownfield bonds is, recognizing the inherent relationship between costs of issuance and the issuance of bonds. *See* MCL 125.2652(o)(i)(H).

Additionally, bonds issued under Act 381 are subject to the provisions of Act 34,<sup>3</sup> which contains separate statutory authority to pay the costs of issuance from the proceeds of bonds.

Specifically, Section 315 of Act 34 provides:

In determining to issue a municipal security, a municipality may do 1 or more of the following ... Authorize payment from the proceeds of the municipal security, or from other funds available, of the cost of issuance, including, but not limited to, fees for placement, fees or charges for insurance, letters of credit, lines of credit, remarketing agreements, reimbursement agreements, or purchase or sales agreements or commitments, or agreements to enhance timely payment of municipal securities.

MCL 141.2315(1)(b) (emphasis added).

Thus, the assertion that “You can bond for whatever amount you choose to, but TIF is available to pay for \$50,217,825 and only that amount” is not supported by the Development documents, the Approvals nor applicable law.

**2. Was the investment income (roughly \$335,000) in the Project Fund properly used to pay for Project expenses?**

During the negotiation of the Development Agreement, one of the City’s primary concerns was ensuring sufficient funds were on hand to ensure completion of the infrastructure improvement and the parking structure. Initially, in order to remedy this concern, the Development Agreement provided that the Developer would post a performance bond in an amount not less than 125% of the costs of such infrastructure improvements and the parking structure. However, once it became apparent that the bond purchaser would fully fund the Project Fund, the parties to the Development Agreement, including the City Council, approved the First Addendum to provide for the deposit of the “DEPOSIT OF 100% OF THE NET BOND PROCEEDS<sup>4</sup> IN THE FULL AMOUNT OF THE CONSTRUCTION COSTS OF THE

---

<sup>3</sup> Section 7 of Act 381 states: “An authority may do 1 or more of the following... Borrow money and issue its bonds and notes under [Act 34], in anticipation of collection of tax increment revenues.” MCL 125.2657(1)(m). Sec. 17. of Act 381 provides: The bonds and notes issued under this section are subject to [Act 34]...”. MCL 125.2667(5).

<sup>4</sup> The reference in the First Addendum to “net bond proceeds” (as opposed to the gross proceeds or simply, the proceeds) of the bonds in the amount of \$24,389,518 supports the proposition that City Council recognized that other costs would be paid from the proceeds of the 2017 Bonds.

INFRASTRUCTURE IMPROVEMENTS AND BUILDING B2 EQUALING \$24,389,518.00 AT CLOSING FOR THE BONDS WITH THE TRUSTEE...” First Addendum, Section 3, Pg. 2.

To ensure that sufficient funds would be on hand to ensure Project completion, the Indenture provision establishing the Project Fund explicitly limited the “Project Fund, the moneys therein and all investment income derived therefrom” to be held for the sole benefit for the Authority for the purpose of ensuring completion of the Project pursuant to the Development Agreement, and that neither the Project Fund, nor the moneys held therein nor any investment income derived therefrom shall constitute the Security (for the 2017 Bonds) until the Project is completed. Indenture, Section 303.

Prior to completion of the Project, the moneys in the Project Fund could only be used to pay the costs of the Project, and the Requests for Disbursement had to be signed by both an Authority representative (a City employee) and the Developer, and had to include an explicit reference to the itemization of expenditures correlating to a category of eligible activities contained in Column 2, Scenario A of the Exhibit N.

Section 404. Use of and Disbursements from Project Fund. (a) Moneys in the Project Fund shall initially be used solely to pay the costs of the Project. Moneys in the Project Fund shall be disbursed by the Trustee to the parties listed on the Request for Disbursement, in substantially in the form attached hereto as Appendix B-1, upon (i) submission of a complete Request for Disbursement by the Developer and (ii) approval by the Authority Project Representative as described herein. A complete Request for Disbursement shall: (A) be signed by an authorized officer of the Developer, (B) include an itemization of the expenditures which correlates to a category of eligible activities contained in Column 2, Scenario A of Exhibit N of the Development Agreement, (C) identify the parties to whom payment is to be made evidenced by invoices of such work, together with any certifications provided by such payment recipients to the Developer that its contractors and suppliers have been paid, (D) include appropriate wiring instructions for the parties to whom payment is to be made, and (E) include documentation sufficient in the reasonable discretion of the Authority Project Representative to enable the Authority Project Representative to determine that the expenditures were made for authorized eligible activities pursuant to the Plan.

...

(c) Upon completion of the Project, the Authority Project Representative shall as promptly as practicable file with the Trustee a certificate substantially in the form of Appendix C attached hereto (the “Completion Certificate”). All moneys in the Project Fund not needed as of the date of the Completion Certificate to pay or reimburse Project Costs (moneys which are so needed shall be retained in the Project Fund and used for such purposes to the extent needed), subject to the condition provided in the second sentence of Section 404, shall upon receipt of the Completion Certificate be deemed Surplus Bond Proceeds, and shall be immediately transferred to the Bond Fund.

Indenture, Section 404 (emphasis added).

As a result, any investment income that accrued in the Project Fund prior to the completion of the Project could only have been used to pay Project costs in the event of a shortfall.

**3. If the Developer is on the hook for shortfalls in any debt service payments (1) why should the Board approve the refunding of the 2017 Bonds and (2) why should the Authority care if there is a default on the payment of debt service on the 2017 Bonds on December 1, 2020?**

Failure to pay the December 1 debt service payment does not constitute a technical, legal default on the 2017 Bonds under the Indenture. Section 701 of the Indenture provides: “Notwithstanding the foregoing, no Event of Default shall occur at any time the Authority is depositing, or causing the deposit of, the Tax Increment Revenues and the DDA Revenues in the Bond Fund as provided in this Indenture.”

However, as previously noted, several Development-related documents indicate the City’s and Authority’s intent to refund the 2017 Bonds in 2020.

In addition to Section 5 of the Purchase Agreement, which acknowledges that the Authority will attempt to issue refunding bonds by June 1, 2020, Section I.8. of the Original Agreement specifies the City’s intent to issue refunding bonds upon the completion of the Project:

Furthermore, the parties acknowledge that the ELBRA may issue non-recourse, draw-down bonds in order to finance the construction costs of the City Approved Eligible Activities. Any such short term draw-down bonds would be sold via private placement to an institutional investor and the timing of the private placement of such bonds would be prior to or in connection with the start of the construction of the City Approved Eligible Activities. Following completion of the construction of the City Approved Eligible Activities, the parties anticipate that the ELBRA will re-market or refinance the short term draw-down bonds by selling long term bonds.

Original Agreement, Section I.8, pgs. 11-12.

Finally, the Indenture grants the Purchaser a right of optional redemption on the 2017 Bonds upon 90 days advance notice, commencing on January 1, 2020.

Section 208. Redemption of Bonds.

...

(c) Purchaser Optional Redemption. Commencing January 1, 2020, and on the first Business Day of each month thereafter, the Bonds shall be subject to redemption in full at the option of the Purchaser, and the Authority shall redeem the Bonds from funds available for this purpose under this Indenture or from the proceeds of the Proposed Refunding Bonds, in whole, at a redemption price of 100% of the principal amount of the Bonds then outstanding plus accrued interest to the date fixed for redemption. The Bondholder shall provide the Authority with ninety (90) days’ advance written notice of its intent to exercise its right of optional redemption pursuant to this section.

Indenture, Section 208.

4. **Does the Developer and its team need to be involved in the process of issuing the Refunding Bonds?**

From a legal standpoint – no.

However, any potential purchaser of the Refunding Bonds is, in essence, purchasing Refunding Bonds in anticipation of the financial success of the Development because debt service on the 2017 Bonds, and any potential Refunding Bonds, will generally be paid solely from Tax Increment Revenues generated by the Development. Neither the 2017 Bonds, nor the proposed Refunding Bonds, are secured by the City's full faith and credit – by far the most common credit for any type of Michigan tax increment financing bonds.

Consequently, the Developer is best positioned to provide the information concerning the Development to provide to potential purchasers during the marketing of the Refunding Bonds.

36729115.6\025637-00026