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May 8, 2013

Via Electronic and Overnight Delivery

Michael D. Durham
County Attorney
Martin County
2401 Southeast Monterey Road
Stuart, Florida 34996

Re: Tax Increment Certification

Dear Mr. Durham:

This is written to provide our analysis and opinion as to the obligation of Martin County (the "County") to appropriate funds for transfer into a redevelopment trust fund created pursuant to Part III, Chapter 163, Florida Statutes, for past fiscal year underpayments as a consequence of error in the calculation of the annual tax increment certification made by the property appraiser. This opinion is provided to assist the County in evaluating its potential liability and that of the property appraiser for such tax increment miscalculation.

It is our understanding that, commencing with County fiscal year 1998 and continuing to date, a parcel coding error in the certification of the tax increment under the statutory formula by the Martin County Property Appraiser (the "Property Appraiser") has resulted in an approximate underreporting of the certified tax increment to the County in the approximate amount of $1.8 million. Such tax certification error also occurred for all other taxing units which are obligated to make an annual transfer into the redevelopment trust fund maintained for the community development district.

Attached is a detailed explanation of the coding error which created the tax increment underpayment.

Section 200.065, Florida Statutes, relating to the fixing of annual millage, requires the Property Appraiser to annually certify the taxable value within the jurisdiction of each taxing authority. Included in such certification is the dedicated increment value defined in section 200.001(8)(h), Florida Statutes. Such certification is made on Florida Department of Revenue Form DR-420TIF.

The tax increment value is defined as the cumulative increase in taxable value within a defined geographic area to be used to determine a tax increment amount to be paid into a redevelopment trust fund pursuant to section 163.387(2)(a), Florida Statutes. The certification required under section 200.065, Florida Statutes, includes the certification of a dedicated increment value.

You have requested our opinion as to the liability of the Property Appraiser and obligation of the County to appropriate from current and future budgets the amounts represented by underpayments resulting from errors in prior tax increment certifications and the liability of the County for a failure to make such appropriation.

Based upon the constitutional underpinning of the tax increment concept embodied in Part III, Chapter 163, Florida Statutes, the County cannot be compelled by any outside party to appropriate annually from future budgets the underpayment amounts as a result of errors of the Property Appraiser. Such conclusion is based upon our analysis of the reasoning contained in the landmark case of State v. Miami Beach Redevelopment Agency, 392 So. 2d 875 (Fla. 1980).

The Miami Beach Redevelopment Agency decision upheld the constitutionality of tax increment financings based upon a challenge that the proposed bonds payable from moneys transferred annually to the redevelopment trust fund pursuant to the statutory formula contained in section 163.387, Florida Statutes, constituted bonds payable from ad valorem taxation requiring elector approval under Article VII, section 12, Florida Constitution. The Court recognized in its factual statement that section 163.387 required an annual appropriation of an amount of funds annually measured by the increase in tax increment. The Court stated as follows:

> Thus the tax increment revenues are measured by the increase in proceeds brought about by the increased value of the property, to be achieved by the improvements made under the redevelopment plan.

392 So. 2d at 893-94.

The Court accepted the constitutional argument of the community redevelopment agency that the statutory tax increment scheme of Part III, Chapter 163, Florida Statutes, required no direct pledge of ad valorem taxes but merely a requirement for an annual appropriation from any available funds and thus the referendum provision of Article VII, section 12, Florida Constitution, was not involved. The basis of the analysis was the principle of constitutional construction that an annual appropriation of ad valorem tax revenues does not bring bonds within the referendum requirement. See Tucker v. Underdown, 356 So. 2d 251 (Fla. 1978). Recognition by the Court of the preservation of an annual appropriation decision under the statutory scheme supported the constitutionality of the tax increment financing concept. The Court held as follows:

> What is critical to the constitutionality of the bonds is that, after the sale of bonds, a bondholder would have no right, if the redevelopment trust fund were insufficient to meet the bond obligations and the available resources of the county or city were insufficient to allow for the promised contributions, to compel by judicial action the levy of ad valorem taxation. Under the statute authorizing this bond financing the governing bodies are not obliged nor can they be compelled to levy any ad valorem taxes in any year. The only obligation is to appropriate a sum equal to any tax increment generated in a particular year from the ordinary, general levy of ad valorem taxes otherwise made in the city and county that year.

392 So. 2d at 898-99.

The constitutional principle reinforced is that the taxing power of a governmental unit cannot be impaired by a general obligation without referendum approval. This principle is founded upon the judicial construction that no outside party can compel by judicial action a local government budgetary decision unless the obligation is payable from a discrete non-ad valorem revenue source or the general obligation is approved by the electors.

Further, section 163.387 does not provide a process for correction of errors in tax increment certification for past years. This absence of statutory authority to cure tax increment certification errors is analogous to former section 218.62, Florida Statutes, regarding distributions under Part IV, Chapter 218, Florida Statutes, relating to the Local Government Half-cent Sales Tax Clearing Trust Fund. The Florida Attorney General's Office opined that because there was no statutory authority for the correction of errors under section 218.62, the Department of Revenue did not have to adjust the monthly distribution of moneys for the current fiscal year where erroneous population figures, on which the distribution is based, were subsequently corrected. Op. Att'y Gen. Fla. 2002-36.[1] Compare Op. Att'y Gen Fla. 1992-87, determining that under the Revenue Sharing Act of 1972 (ss. 218.20-218.26), statutory authority existed for adjustment in the revenue sharing distribution during the fiscal year where the population estimates are revised due to error.

We have also examined the interlocal agreement between the County and the Martin County Community Redevelopment Agency, dated March 13, 2012. Such agreement relates to the duties and obligation between the parties in implementation of the community redevelopment plan and does not create any contractual liability that would change the analysis in this opinion.

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[1] In response to this opinion, section 218.62, Florida Statutes, was revised by ch. 2003-33, Laws of Florida, to allow adjustment during the current fiscal year in the case of error in the certified population figures.

Additionally, it is our opinion that the Property Appraiser is generally immune from liability for damages for the error based upon constitutional principles of sovereign immunity. Art. X, § 13, Fla. Const. Though it appears unlikely, to the extent there is any viable cause of action in tort, section 768.28, Florida Statutes, provides a limited waiver of sovereign immunity for which damages are capped. See First American Title Co. of St. Lucie County, Inc. v. Dixon, 603 So. 2d 562 (Fla. 4th DCA 1992).

This analysis does not prevent the County on an annual appropriation basis from transferring funds voluntarily to the redevelopment trust fund to compensate for the underpayment. However, it is our opinion that no outside party can compel such annual appropriation decision.

Very truly yours,

Robert L. Nabors

RLN/adm

Attachment

cc: Taryn G. Kryzda, MPA, CPM, County Administrator

Discovery of CRA Coding Error

The error was discovered when we were cross checking various reports for discrepancies. It was found that the parcel count for the CRAs didn't increase from previous years.

Finding No. 1

We then looked at the procedure for coding CRA parcels to find out why the parcel count hadn't increased. We found that when "parent" parcels were subdivided or split into "new" parcels, the new parcels were not coded as part of the CRA. The error happened because a procedure to code the "new" split off parcels was not in place.

For example, when the Harborage Condominium complex was built, the "parent" parcel split off into "new" condominium parcels. The new condominium parcels were not coded as being part of the CRA.

Finding No. 2

We then used digital map technology as a tool to verify that parcels located in the CRA boundaries were correctly coded. Using this technology, the digital map "lights up" the coded parcels, so that parcels not coded are also shown on the map.

Digital map technology, which was not available at the time the boundaries were originally established, helped find a number of other parcels that were not coded as CRA from the beginning. We attribute this coding error to a time when boundaries were hand drawn using paper and pencil, which left room for human error.