DOUGLAS R. HOFFER
STATE AUDITOR

STATE OF VERMONT
OFFICE OF THE STATE AUDITOR

To: Senator Ann Cummings, Chair, Joint Fiscal Committee
Date: 2 September 2019
Re: VEPC & TIF: Addendum
Cc: House Ways & Means and Senate Finance Committees
House & Senate Appropriations Committees
House Commerce and Senate Economic Development Committees
House & Senate Government Operations Committees
Attorney General Thomas J. Donovan

As I mentioned in the accompanying memo, the issue of dueling legal opinions and VEPC's choices deserves additional attention. I hope this short memo is helpful in explaining what transpired.

Vermonters are aware that there are risks when public officials act as advocates for programs they are also charged with overseeing. Such conflicting roles can affect objectivity and influence decisions about how a program is administered – in fact or in perception. One example of this conflict is the State's promotion and oversight of the EB-5 program. Recent events concerning the State's Tax Increment Financing (TIF) program provide another.

Our recent compliance audit of the St. Albans TIF district found, among other things, that the city used $1 million of borrowed money intended for infrastructure investments to pay the debt service on those very bonds. As a result, the City did not invest that $1 million in infrastructure as required by statute, which represents a cost to taxpayers in other towns.

The city said the money was a "working capital reserve fund" intended to cover debt obligations before the TIF district generated enough new revenue to do so.

The statute seemed clear that this was not a permitted use of bonded debt for TIF towns, but we asked the Attorney General's (AG) Office to weigh in on the matter. The AG's opinion said unequivocally that TIF-related bond proceeds cannot be used for debt service. Accordingly, we recommended that the City "Repay the TIF Capital Projects Fund approximately $1 million for the debt proceeds used for TIF district debt." In other words, that money should go to infrastructure investments aimed at attracting private development – not the principal and interest on the same debt.

St. Albans stated that it had acted on the advice of counsel, who acknowledged the plain language of the TIF statute but argued for an expansive reading, incorporating provisions of a different statute. St. Albans subsequently sought relief from VEPC as part of a "substantial change" request.

132 State Street ♦ Montpelier, Vermont 05633-5101
802.828.2281 ♦ Toll-Free in VT only: 877.290.1400 ♦ Fax: 802.828.5599
aud.auditor@vermont.gov♦ www.auditor.vermont.gov

In response, VEPC said that it would consider the issue "from the perspectives of opinions issued by all relevant parties."

This was a curious statement. First, among other things, the AG is the State's attorney charged with interpreting Vermont law (3 VSA §159) to help the Executive Branch conduct its business; it's not just one voice among many. Second, private attorneys don't issue opinions in the public interest; they offer advice to self-interested clients, like the City of St. Albans. Third, interpreting statutes for compliance purposes is not analogous to a policy debate that requires input from affected parties who hold different values. The issue was not a matter of values but whether the law was followed.

A subsequent memo[1] to VEPC from the inhouse attorney at the Agency of Commerce & Community Development admitted that the TIF statute was more restrictive than other municipal statutes regarding uses of debt proceeds.

Nevertheless, instead of honoring the AG's opinion, the Agency attorney determined that "broader consideration of tax statutes in Title 32 appears necessary" (emphasis added).

To support that assertion, the Agency's attorney created a straw man, suggesting that towns need substantial cash in hand to meet debt service obligations before development generates new tax revenue to cover the debt. But this logic assumes that a town must pay principal and interest from day one. There is no such requirement, and towns are free to negotiate bond terms allowing for interest-only payments for the first few years. In addition, St. Albans could have paid for early debt service out of their own funds, as other towns have done.

The Agency's attorney contended further that if a town put aside some money during the multi-year period of planning and approvals, it would make VEPC less likely to find that: "but for" TIF, the town "would not be able to undertake the proposed TIF District improvements."

Thus, according to the Agency's attorney, adhering to the statute and acting prudently might be fatal to an otherwise deserving community's TIF application. This seems like a stretch. Establishing a modest reserve fund in advance is not the same as having the millions required for major infrastructure work.

On this rather thin foundation, the Agency attorney further suggests that the AGO's "restricted view of TIF borrowing" limited to Title 24 "would not be without undesirable impact on the program."

This characterization questions the competence of the AG's reasoning (i.e., "restricted view") and portrays Title 24 as lifeless on its own. The former is contradicted by the Agency attorney's acknowledgment that the AG "dutifully applied accepted rules of statutory construction." The latter only makes sense if we ignore the substance of the AG's memo.

The AG makes clear that "the legislature intended to treat TIF bonds as a special category of debt subject to special rules...[and that this subchapter] is intended as an independent and comprehensive conferral of powers to accomplish the purposes set forth [in 24 V.S.A. § 1898(a)]" (emphasis added).

[1] https://auditor.vermont.gov/sites/auditor/files/documents/John%20Kessler%20Advice%20to%20VEPC%20-%20MAY%202019%20-%20St.%20Albans%20Use%20of%20Debt%20Proceeds.pdf

132 State Street ♦ Montpelier, Vermont 05633-5101
802.828.2281 ♦ Toll-Free in VT only: 877.290.1400 ♦ Fax: 802.828.5599
aud.auditor@vermont.gov♦ www.auditor.vermont.gov

In the end, VEPC disregarded the AG's opinion and accepted the position first espoused by the City's attorney and later echoed by the Agency's attorney. On this basis, it approved the City's request to retroactively allow the use of TIF bond proceeds to pay debt. This effectively shifts all risk from the TIF towns that do this to the Education Fund and taxpayers from other towns.

The evidence suggests that VEPC chose to rely on the legal advice it needed to achieve a preferred outcome. And, it seems likely that it hoped to extend this authority to all TIF towns through rulemaking.

These events raise questions quite apart from the issues specific to the TIF program. The most important is the problem of conflicts for those charged with oversight of publicly funded programs. One need not question the good intentions of the responsible parties to accept the possibility that their eagerness to support the goals of the program may inadvertently compromise their objectivity and independence in overseeing it.

132 State Street ♦ Montpelier, Vermont 05633-5101
802.828.2281 ♦ Toll-Free in VT only: 877.290.1400 ♦ Fax: 802.828.5599
aud.auditor@vermont.gov♦ www.auditor.vermont.gov