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**STATE OF VERMONT
OFFICE OF THE STATE AUDITOR**

To: Senator Ann Cummings, Chair, Joint Fiscal Committee
Date: 2 September 2019
Re: VEPC and TIF
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 promised when I testified before the Joint Fiscal Committee on July 29, I want to offer additional information about a few issues arising from our audit of the St. Albans Tax Increment Financing (TIF) District and the subsequent actions by the Vermont Economic Progress Council.

A matter of compliance, not policy: Some have attempted to situate our audit report in a broader discussion of the value of TIF. But we did not issue a white paper on a matter of policy. We issued an audit report that evaluated compliance in accordance with statute and rules. And, while there are always different sides to a policy debate, there are no “sides” when auditing compliance. If the law is clear, as it was for the matter discussed below, it is a question of whether the law was followed or not.

Dueling Legal Opinions: Our audit report relied on an unambiguous legal opinion from the Attorney General’s (AG) office regarding the use of bond proceeds to pay debt, and we recommended repayment of the funds. The City of St. Albans subsequently sought relief from VEPC as part of a “substantial change” request. VEPC disregarded the AG’s opinion and approved the City’s request to retroactively allow the use of bond proceeds to pay TIF debt. That is money St. Albans borrowed that was not used for TIF District investments to expand the grand list, but instead was used to pay principal and interest on the same borrowed money at the expense of the state Education Fund. Instead of relying on the AG, which said that was not a lawful use of TIF debt, VEPC relied on a memo from the in-house attorney for the Agency of Commerce and Community Development (ACCD).

The notion that opinions from ACCD’s attorney or any other agency-based attorney carry the same weight as opinions from the Attorney General’s office (AG) is problematic. The Legislature made it clear decades ago that the AG is the State’s Attorney who is, among other things, responsible for legal opinions.

“The Attorney General shall advise the elective and appointive State officers on questions of law relating to their official duties and shall furnish a written opinion on such matters, when so requested.” 3 V.S.A. § 159

Therefore, opinions from the AG are not just one voice among many. To rely on conflicting opinions from agency-based attorneys is contrary to statute and diminishes the stature of the AG, who is independent and is directly accountable to the people of Vermont.

Moreover, the idea that agency-based opinions are more authoritative than opinions from the AG encourages state entities to shop for legal opinions, which, as happened here, creates uncertainty and conflicts within state government.

A more detailed explication of VEPC's actions and the dueling legal opinions is contained in a second document accompanying this memo.

Unfounded Claim of Auditor Bias: The St. Albans City Manager has claimed that "the auditor's criticism stems from his philosophical opposition to TIF as an economic development instrument."¹

That is baseless and impugns the integrity of the work of my office.

I am not philosophically opposed to TIF. What I have said publicly is that it is very difficult to determine the return on investment from TIFs because the assertion that a particular development would not have occurred in Vermont at all "but for" the TIF program cannot be determined with certainty. The recent Joint Fiscal Office report arrived at the same conclusion.²

More importantly, there is no room for opinions in audits done according to Generally Accepted Government Auditing Standards (GAGAS), and these audits are subjected to a rigorous peer review. All findings and conclusions are backed by "sufficient and appropriate audit evidence."³ I invite you to review the workpapers from the St. Albans TIF audit at my office.

Finally, numerous TIF audits by the Vermont State Auditor's Office (SAO) were conducted before I took office, and compliance problems were identified in all of them.

For all of the above reasons, the argument that the compliance issues found in the St. Albans audit report reflects a bias on my part is either uninformed and/or an attempt to divert attention from the audit findings.

Conflicting Missions: VEPC is charged with administering the State's TIF program. This includes approval of TIF applications, rulemaking, oversight and enforcement of the towns' compliance with relevant statutes and rules. The statute does not charge VEPC with promoting or advocating the TIF program. Indeed, VEPC's statutory responsibilities require objectivity to ensure fairness in administration and oversight to protect the State's Education Fund and taxpayers. Recent events raise concerns about VEPC's objectivity.

¹ https://vtdigger.org/2019/08/21/legislatures-joint-fiscal-committee-seeks-to-sort-out-st-albans-tif-quarrel/?is_wppwa=true&wpappninja_cache=friendly

² See page 41. <https://jfo.vermont.gov/assets/docs/reports/79f1f110da/Final-TIF-Report-January-24-2018.pdf>

³ SAO Performance Standards Manual 7.1.2.2b
<https://auditor.vermont.gov/sites/auditor/files/documents/PSM%20Version%203.0%20-%202008-01-19.pdf#page=89>

For example, VEPC's comments in response to the St. Albans TIF audit included this admonition:

*"[T]he Council believes that the tone of the audit report's current draft title does not embody a constructive approach...[and] encourages a negative perspective from the onset."*⁴

The report title is based on the audit findings and conclusions, as required by GAGAS. Additionally, compliance audits are intended to assist auditees by identifying areas of non-compliance, if any, and recommending corrective actions. Therefore, compliance audits are "constructive" by definition. The Council's statement shows a lack of understanding about the nature and purpose of a GAGAS audit and the independent role of the State Auditor's Office.

In addition, VEPC's concern about a "negative perspective" suggests apprehension about public perception rather than focusing on the substance of the audit findings.

VEPC's response to the audit also included a robust defense of the need for and performance of St. Albans' TIF district.⁵ This was curious because: 1) VEPC was not the auditee; 2) St. Albans submitted its own lengthy management comments; and 3) the District's performance was not at issue since we conducted a compliance audit, as required by statute.

VEPC's viewpoint mirrored that of St. Albans, which articulated a misguided view of the relationship between the parties.

*"Over the last five years, the City of St. Albans has formed a strong partnership with the State of Vermont through the Vermont Economic Progress Council."*⁶

VEPC used the same language in its management comments in response to the audit.

"VEPC has been reviewing all sections of the TIF Rule with the Tax Department's Property Valuation and Review staff. Once this initial review is complete, VEPC will engage the TIF Districts and other partners and go through the Rule Making process for public input and adoption" (emphasis added).⁷

VEPC's oversight and enforcement responsibilities require an arms-length relationship more akin to a regulator than an advocate. The accountability and transparency required for a public program to operate with integrity is compromised when an oversight body views itself as a partner that can interpret the laws and rules for the convenience of those that it oversees. 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 managing it.

⁴ See page 92. <https://auditor.vermont.gov/sites/auditor/files/documents/St.%20Albans%20TIF%20-%20Final%20Report%20with%20Bookmarks%20v.3.pdf>

⁵ See page 93. <https://auditor.vermont.gov/sites/auditor/files/documents/St.%20Albans%20TIF%20-%20Final%20Report%20with%20Bookmarks%20v.3.pdf>

⁶ Ibid. See page 70.

⁷ Ibid. See page 96.