

## MEMORANDUM

TO: George B. "Jeb" Spaulding, Vermont State Treasurer  
Bill Griffin, Chief Assistant Attorney General  
Jaye Pershing Johnson, Assistant Attorney General  
Susanne Young of the Governor's Office  
Tom Evslin, Chief Recovery Officer

FROM: Meghan B. Burke  
Colin M. McNiece

DATE: September 29, 2009

RE: Allocation of Recovery Zone Economic Development Bond Volume Cap

---

Based on our legal analysis and discussions with Bill Griffin and Jaye Pershing Johnson of the Attorney General's Office and Susanne Young of the Governor's Office, we are able to give our opinion that the Joint Fiscal Committee may make the allocation of the Recovery Zone Economic Development Bonds ("RZEDB") to the Vermont Municipal Bond Bank (the "Bond Bank"). It is our opinion that the allocation in the American Recovery and Reinvestment Act of 2009 ("ARRA") constitutes a "thing of value" under 2 VSA 503(b)(3).

Pursuant to Internal Revenue Service Notice 2009-50, upon the waiver by a county of its Recovery Zone Economic Development Bond volume cap allocation, the "State" may use such volume cap itself or may reallocate the volume cap. The State may reallocate the waived volume cap "in any reasonable manner as it shall determine in good faith in its discretion." Thus the reallocation is subject only to state law requirements.

Vermont law does not clearly delineate where the authority to reallocate the volume cap may lie. As a constitutional matter the spending power lies with the executive and the power to make appropriations lies with the legislature. See Hunter v. State, 177 Vt. 339, 348-49 (2004). However, the authority to reallocate a federal apportionment of volume cap for bond financing falls somewhere in between. Through several statutes the General Assembly has expressed an intent to have a role in similar acts.

The Emergency Board, established under 32 V.S.A. §131, has been designated pursuant to 32 V.S.A. §992 to allocate the State's private activity bond ceiling. However, the Emergency Board's authority is not broad enough to include the allocation of volume cap for public purpose

bonds. No Vermont statute expressly provides for the allocation of federal volume caps for public purpose bonds.

However, the Joint Fiscal Committee established under 2 V.S.A. §501 is charged with accepting any “grants, gifts, or any other thing of value, approved by the governor, under the provisions of 32 V.S.A. §5, when the general assembly is not in session.” 2 V.S.A. 503(b)(3). 32 V.S.A. §5 provides the mechanism for making a submission to the Joint Fiscal Committee. Because the itemized requirements for such a submission speak primarily to grants, it is arguable that the phrase “other things of value” was not intended to be a category unto itself. However, standard rules of statutory construction require that a statute be interpreted broadly and that the words used be given their plain and ordinary meaning.<sup>1</sup> The phrase “other things of value” is used in describing the duties of the Joint Fiscal Committee in 2 V.S.A §501 and again in 32 V.S.A. §5 when setting for the categories to which the approval process applies. Characterizing the allocation of federal volume cap as a “thing of value” permits the Joint Fiscal Committee to accept the Governor’s approval and 32 V.S.A. §5 provides the framework under which the Governor is required to submit his approval.

The value to the State arising from the allocation of federal volume cap and reallocation to the Bond Bank comes in two forms. First, by enabling the Bond Bank to issue Recovery Zone Economic Development Bonds, the state is benefiting by the fact that public use projects are advanced, bringing with them their inherent contributions to employment and local government function. At the same time, the State is able to advance such projects, the bonds issued by the Vermont Municipal Bond Bank would not be obligations of the State.

The second form of value to the State arises from the potential to realize the subsidy for interest payments made on bonds issued pursuant to the allocation because the State could use the allocation itself in issuing RZEDBs for qualified purposes. The Treasurer may issue bonds under 32 V.S.A §902 to pay expenses for which appropriations have been made. Act No. 43 of 2009 appropriates capital funds and authorizes their financing through bonding. Several of the projects for which appropriations have been made would have a “qualified economic

---

<sup>1</sup> See State v. Stell, 937 A.2d 649, 653 (VT 2007) (assumption that the Legislature intended the plain and ordinary meaning of the language it used); See also Lique v. Bellows Falls Union High School, 160 Vt. 101, 104 (1993) (will not construe a statute in a way that renders a significant part of it pure surplusage); Chamberlin v. Vermont Dept. of Taxes, 160 Vt. 578, 580 (1993) (statutes be construed "reasonably so as not to defeat their purpose).

Allocation of RZEDB Volume Cap  
September 29, 2009

development purpose<sup>2</sup>” as defined in the Internal Revenue Code and thus be eligible for financing through the issuance of RZEDB if those projects are located within a Recovery Zone.<sup>3</sup>

Because the State could potentially use the allocation itself and thus receive the subsidy, it does have value to the State. As a thing of value it appropriately falls under the jurisdiction of the Joint Fiscal Committee. The Governor’s acceptance of the allocation would then be submitted pursuant to 32 V.S.A §5.

32 V.S.A. § 5 requires that the governor’s approval be submitted along with the following information:

- (A) the source of the grant, gift or loan;
- (B) the legal and referenced titles of the grant;
- (C) the costs, direct and indirect, for the present and future years related to such a grant;
- (D) the department and/or program which will utilize the grant;
- (E) a brief statement of purpose; and
- (F) impact on existing programs if grant is not accepted.

Thus to meet the requirements of 32 V.S.A. §5, the Governor would (following waiver by all the Counties) submit to the Joint Fiscal Committee an acceptance of the aggregate Recovery Zone Economic Development Bonds volume cap waived by the Counties including the information above and outlining a program to reallocate the volume cap to the Bond Bank.

The Bond Bank would issue Recovery Zone Economic Development Bonds pursuant to the allocation and use the proceeds to purchase the taxable general obligation or revenue bonds

---

<sup>2</sup> IRC Section 1400U-2(c) defines the term “qualified economic development purpose” for purposes of § 1400U-2 to mean any expenditures for purposes of promoting development or other economic activity in a recovery zone, including (1) capital expenditures paid or incurred with respect to property located in the recovery zone, (2) expenditures for public infrastructure and construction of public facilities, and (3) expenditures for job training and educational programs. This broad definition of qualified economic development purpose includes capital expenditures (as defined in § 1.150-1(b) of the Income Tax Regulations) and working capital expenditures to promote development or other economic activity in a recovery zone.

<sup>3</sup> Section 1400U-1(b) provides that, for purposes of §§ 1400U-1 through 1400U-3, the term “recovery zone” means: (1) any area designated by the issuer as having significant poverty, unemployment, rate of home foreclosures, or general distress; (2) any area designated by the issuer as economically distressed by reason of the closure or realignment of a military installation pursuant to the Defense Base Closure and Realignment Act of 1990; and (3) any area for which a designation as an empowerment zone or renewal community is in effect as of the effective date of ARRA, which effective date is February 17, 2009.

Allocation of RZEDB Volume Cap  
September 29, 2009

of the governmental units participating in the Bond Bank's pool issuance. The Bond Bank would receive the interest subsidy from the U.S. Treasury and apportion the savings among the pool participants. This structure offers the most efficient means for the State to realize the benefits of local economic development projects without incurring a direct obligation on the debt issued.