




OFFICE OF COUNTY COUNSEL  
INTER-DEPARTMENT MEMORANDUM

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**TO:** Board of Supervisors  
**FROM:** David A. Livingston, Sr. Deputy County Counsel   
**DATE:** January 6, 2015  
**RE:** Funding for Preparation of MC&FP Phase II

As part of their efforts to develop Phase II of the Missouri Flat Master Circulation and Funding Plan ("MC&FP"), Long Range Planning staff asked us to provide an opinion as to whether money collected from sales and property tax increment in the MC&FP area can be used to fund staff and professional services in the creation of Phase II of the MC&FP. The short answer to this question is that the money can be used for that purpose only if the County finds that such use is "consistent with the MC&FP." This memorandum will explain the basis for that conclusion in order to assist the Board of Supervisors in making its determination.

**BACKGROUND**

When the MC&FP was developed, the County identified improvements needed to support future development and to remedy existing deficiencies. Funding for the improvements, other than those to be constructed solely by project applicants, was to come from two sources: Traffic Impact Mitigation Fees and tax increment revenue derived from new development. That tax increment represents the County's contribution to remedy existing deficiencies and is comprised of up to 85% of the new tax revenue (property and sales tax) generated by new development in the MC&FP area.

The MC&FP was implemented through development agreements with developers in the MC&FP area. Those development agreements (approved at the same time as the MC&FP) created the obligation to set-aside the tax increment and, most significant to this discussion, established the manner in which that tax increment was to be expended.<sup>1</sup> As to this issue, each

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<sup>1</sup> Note that the provisions of the development agreements that affect the security or payment of any CFD bonds (e.g., the provisions requiring the County to set-aside tax increment revenue) survive expiration of the development agreements. (Development Agreements, § 1.D.)

development agreement—El Dorado Villages Shopping Center, Walmart, and Sundance Plaza—contained the following identical language:

In order to satisfy County's commitment, County agrees annually to commit a sum equal to eighty-five percent (85%) of the Total Tax Increment generated by Missouri Flat Area Development in that year to funding MC&FP Improvements. ... County's obligation shall continue until all MC&FP Improvements are completed and all financial obligations related thereto have been discharged, or any remaining financial obligations have been fully funded through reserve accounts or similar mechanisms, so that the Property is no longer subject to the lien of the CFD special tax or there are sufficient moneys in the Special Reserve Account to make bond payments as they come due for the term of the CFD Bonds or to redeem the CFD Bonds. The Tax Increment Revenues may be used for *any purposes consistent with the MC&FP* including, but not limited to, direct payment for the cost of MC&FP Improvements on a pay-as-you-go basis, contribution of funds to the CFD for debt service and CFD costs associated with CFD bonded indebtedness used to fund MC&FP Improvements, repayment of TIM Fee advances made pursuant to Section 6.J of this Development Agreement, contributions to the CFD for redemption of bonds, payment of design and engineering costs, right-of-way acquisition, and accumulation of Tax Increment revenues in a special account for future use consistent with the MC&FP with respect to MC&FP Improvements, such as accumulation of funds for future MC&FP Improvements. Except as may be expressly provided in this Development Agreement, the specific purpose for which the funds are used and the timing of the use of such funds shall be at the discretion of the County to be exercised for the achievement of the goals of the MC&FP. (Development Agreements, § 6.B [emphasis added].)

Moreover, the County's obligation to contribute tax increment to the CFD is described as an annual obligation that does not carry over to subsequent years. (Development Agreements, § 6.E.) Accordingly, the foregoing obligation is not intended to "prevent the use in any year of funds accumulated, but not spent, during prior years from the committed Tax Increment Revenues, for *any purposes consistent with the MC&FP*." (Development Agreements, § 6.B [emphasis added].)

The development agreements go on to dictate the sequence of use of the tax increment prior and subsequent to the issuance of bonds. It is my understanding, though I was unable to confirm this, that the County has not issued bonds. Accordingly, I will only discuss those portions of the development agreements addressing use of tax increment prior to issuance of



bonds.<sup>2</sup> In that scenario, first, the County must make deposits into a special reserve account until the account contains \$1.5 million. (Development Agreements, § 6.B.1.a.) Next, the County must repay any TIM Fees that were advanced by the County to accelerate completion of certain MC&FP Improvements. (Development Agreements, § 6.B.1.b.) Finally, the County may use any remaining revenue to “fund MC&FP Improvements, or *for any other purpose consistent with the MC&FP*, as set forth in Section 6.B [above].” (Development Agreements, § 6.B.1.c [emphasis added].) “The determination of the uses to which such revenues will be put shall be made by County in furtherance of the goals of accelerating completion of MC&FP Improvements, repaying any moneys advanced by County from other sources, reducing the need for issuance of bonded indebtedness, or the reduction of existing indebtedness, as in the judgment of County will result in the most effective implementation of the MC&FP.” (Development Agreements, § 6.B.1.c.)

### ANALYSIS

Assuming that the special revenue account is fully-funded (\$1.5 million) and TIM Fee advances have been repaid, the key inquiry is whether development of Phase II of the MC&FP is “consistent with the MC&FP.” To that end, note that when the County adopted the MC&FP in 1998, it only adopted Phase I due to concerns that then newly-adopted Measure Y would preclude use of tax increment for Phase II improvements that would provide additional capacity for new development. The development agreements define the term “MC&FP” accordingly: “‘Missouri Flat Area Master Circulation and Funding Plan’ or ‘MC&FP’ means that certain planning and policy document adopted by the Board of Supervisors of County on December 15, 1998.” (Development Agreements, § 1.I.11.) Similarly, the development agreements define the “MC&FP Improvements” as only the Phase I improvements. (Development Agreements, § 1.I.9.) Thus, when the development agreements refer to the “MC&FP” or the “MC&FP Improvements,” they are referring only to MC&FP Phase I.

Applying that definition to the issue at hand, the question becomes whether the use of sales and property tax increment to fund the creation of MC&FP Phase II is consistent with MC&FP Phase I. To that end, one should ask whether development of MC&FP Phase II will further the achievement of the goals of MC&FP Phase I and whether it will result in the most effective implementation of MC&FP Phase I. The development agreements leave this determination to the County to be made in accordance with the above-quoted provisions of the

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<sup>2</sup> If the County has issued or intends to issue bonds, another consideration in this analysis is the commitment that the County has made to future bondholders pursuant to Ordinance No. 4785, adopted on September 23, 2008. That ordinance, adopted in furtherance of Section 6.E of the development agreements, creates a binding commitment to contribute funds annually to the Community Facilities District (“CFD”) to pay debt service and other CFD expenses, if any, which would otherwise be funded by the special tax levied on properties in the MC&FP area. Like the development agreements, the ordinance specifies that the obligation it creates does not carry-over from year-to-year and that it does not prevent the use of funds accumulated, but not spent during prior years, for “any purposes consistent with the MC&FP.”

development agreements as well as the covenant of good faith and fair dealing implied in all contracts.

### **CONCLUSION**

The agreements that created the County's obligation to set aside tax increment revenues from the MC&FP area allow the County to use those revenues for any purpose consistent with the MC&FP. Before authorizing the use of those revenues to support development of Phase II of the MC&FP, you should make express findings that such use complies with the restrictions contained in the development agreements, as set forth above.

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