

# BASS

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## M E M O R A N D U M

TO: Mike McMahan, Chattanooga City Attorney  
Rheubin Taylor, Hamilton County Attorney

FROM: George H. Masterson

DATE: October 9, 2012

RE: Black Creek Mountain TIF—Response to Memorandum published in The Chattanooga.com

This firm serves as bond counsel to MSBC Black Creek, LLC (the Developer) in connection with the Black Creek Mountain economic impact or tax increment plan and is provided in response to an article published in the October 8<sup>th</sup> edition of The Chattanooga.com. That article included the full text of a Memorandum of Ms. Helen Burns Sharp to members of The Industrial Development Board of the City of Chattanooga in which Ms. Sharp encourages the members to vote against a resolution approving the Black Creek Mountain tax increment financing documentation and makes many inaccurate and misleading statements about the Black Creek Mountain TIF and the procedure that the IDB, the City of Chattanooga and Hamilton County have followed in approving the TIF at every previous occasion.

As a general response to Ms. Sharp's request, I point out that the Black Creek Mountain TIF plan has been previously approved, after publication of all required notices and extensive discussion, by the Chattanooga IDB, the Hamilton County Commission and the Chattanooga City Council. Mrs. Sharp now seeks to delay the TIF financing by requesting that the members of the IDB vote against approval of documents that implement a financing that is consistent with the prior IDB, County and City approvals, complies with all applicable state laws and expressly imposes no risk of non-payment or default on the IDB, the City or the County.

Specifically, I provide the following responses to each of the points made by Ms. Sharp, using Ms. Sharp's paragraph numbers and headings. (In the interest of brevity (or some semblance of brevity) I have omitted some of Ms. Sharp's statements, but have certainly attempted to include the gist of each of her statements and have noted each omission with ellipsis.)

## Legal Issues

### 1. Project Eligibility.

a. *Ms. Sharp's Statement:* "The Economic Impact Plan for Black Creek Mountain says that it is an eligible project within the meaning of TCA Section 7-53-101(13) but does not cite the applicable subsections. The statute requires that the Plan meet the definition of **two** [emphasis added] or more subsections. It is easy to see the subsections that it does not meet. It is difficult to ascertain even one in the list of 19 it clearly meets."

b. *Response:*

i. The subsections of the definition of "project" that are applicable to the Plan Area include:

1. Section 7-53-101(13)(A)(iii), which includes any land and building, including office building, suitable for use by "any commercial enterprise in selling, providing, or handling any financial service or in storing warehousing, distributing or selling any products of agriculture, mining or industry." The Plan Area will include commercial and retail facilities.

2. Section 7-53-101(13)(C), which includes "pollution control facilities", which are defined at 7-53-101(12) as including "waste water collecting systems." The Plan Area will include, and the Economic Impact Plan provides for TIF financing for, sewer improvements.

ii. Section 7-53-101(13) does NOT require that a potential project meet more than one of the uses listed in that section, but rather by using the word "or" permits combinations of two or more sections. The relevant part of 7-53-101(13) reads: " Any land and building, including office building, any facility or other improvement on the land, and all real and personal properties deemed necessary in connection therewith, whether or not now in existence, that shall be suitable for the following **or** [emphasis added] by any combination of two (2) or more thereof".

iii. The projects related to the Plan Area clearly fall within the relevant definitions, but it is also important to note that Section 7-53-102(b) of the IDB statute calls for the statute to be liberally construed to further the legislative intent behind the statute of furthering economic development in the State.

2. Authorship of Economic Impact Plan.

- a. *Ms. Sharp's Statement:* "State law [TCA Section 7-53-312(a)] states that Industrial Development Corporations are to prepare Economic Impact Plans. This is the document that the Industrial Development Board, the County Commission, and the City Council voted to approve. The resolutions approving the Plan state that MSBC Black Creek (Developer) prepared the Plan."
- b. *Response:*
  - i. The Developer has not attempted to hide or mask its participation in the TIF process and was actively involved in the preparation of the initial draft of the Economic Impact Plan, which its representatives submitted to the IDB and its counsel for review and comment.
  - ii. The IDB TIF statute does not require that members of the IDB actually prepare the Economic Impact Plan. Rather, Section 7-53-312(a) provides that an IDB "is authorized to prepare and submit to the municipality for approval an economic plan in the manner described in this section."
  - iii. Again, Section 7-53-102(b) provides for a liberal interpretation of the IDB statute and, thus, a narrow reading of "prepare" is not appropriate.

3. Zoning.

- a. *Ms. Sharp's Statement:* ". . . All of the property is currently zoned R-1, low density residential. None of these [commercial] uses is allowed in this zone. Is it OK to presume future zone changes? . . . "
- b. *Response:* According to the Developer, the property in the Plan Area currently has an R-1 classification and no improvements will be constructed by MSBC Black Creek that do not meet the applicable zoning classification at the time of construction or a variance therefrom.

4. Reservation of Lots Prior to Plan Approval.

- a. *Ms. Sharp's Statement:* "State law (TCA Section 13-4-306) prohibits transferring lots in an unapproved subdivision. On October 2011, this wording appeared on the Black Creek Facebook page: 'Three of brow lots already gone, better come and reserve one.' The Planning Commission has not granted plat approval for this phase of the development. Was Developer negotiating to sell prematurely?"
- b. *Response:* Neither the statements made by the Developer on its web or social media sites nor its acceptances of indications of interest in future lots rise to the level of negotiating to sell lots under an illegal plat or subdivision, as

contemplated by TCA Section 13-4-306. Compliance with that section also has no bearing on the whether a proposed TIF plan has met applicable state law.

### **Other Policy Issues That Should Be Addressed Prior to Bond Issuance.**

#### **5. Citizen Participation.**

- a. *Ms. Sharp's Statement:* "The only public hearing for a \$9 million tax subsidy approved by three governing bodies was held by the Industrial Development Board at the very beginning of the process (May 1) when virtually no members of the public were aware of the project or the meeting. . . ."
- b. *Response:* In approving the Economic Impact Plan and submitting it to the City and County for further approval, the IDB complied with Section 7-53-312(g) of the IDB TIF statute, which requires a public hearing prior to the submission of the Plan to the approving city and county (and, thus, at the beginning of the approval process), held after two weeks prior notice in a newspaper of general circulation giving the details of the meeting and the place where a map of the proposed plan area can be viewed by the public. Such a notice was timely published in The Times Free Press and members of the public were invited to appear and speak at such meeting.

#### **6. Decision Making Criteria.**

- a. *Ms. Sharp's statement:* "This was the first TIF request in Hamilton County/Chattanooga, yet there was no presentation by city or county staff at meetings about tax increment financing; its origins; how it has been used in other places; some factors the policy makers might want to take into account in determining whether or not to approve the request. Two basic criteria might be to ask the applicants to demonstrate public benefit and to show that the project would not happen without taxpayer help."
- b. *Response:* The Black Creek Mountain TIF may be the first such request in Chattanooga and Hamilton County, but it certainly has not gone without significant discussion by City and County staff and elected officials and extensive public debate. Representatives of the Developer discussed the Black Creek TIF plan with the City and County attorneys on numerous occasions and appeared at an IDB meeting and public hearing, a County Commission agenda session, a County Commission regular meeting, a City Council agenda session and a City Council regular meeting, at each of which it presented details of the Black Creek TIF and responded to numerous question, including the extensive public benefit that will come from an early start to the Black Creek development and the significance of TIF financing toward that development. Ms. Sharp apparently feels compelled to attack a valid approval process because she is unhappy with the result of that process.

7. Public Benefit.

- a. *Ms. Sharp's Statement:* "Given that public taxpayer dollars are involved, developers should be asked to demonstrate public benefit. For up to 20 years, new property taxes generated in the project area would go to pay back the developers, with interest for the bonds they purchased for the road. During this period, other city taxpayers will in effect pay the cost of providing the new Black Creek residents with fire and police, garbage and road maintenance. . . ."
- b. *Response:* Under Ms. Sharp's line of reasoning, no TIF would satisfy the public benefit test because in each case taxes are applied to service debt for development projects rather than normal governmental function. The public benefit underlying TIFs in general and the Black Creek Mountain TIF in particular is the promotion of early development of the project with funds advanced by the developer or its lender rather than the governmental unit and will provide public facilities that will enhance the governmental unit (in this case the road and sewer improvements) that will lead to more development and more tax collections in the future.

8. The "But For" Test.

- a. *Ms. Sharp's Statement:* ". . . it is common for local governments to evaluate TIF requests based on the 'but for' test. The applicant is asked to demonstrate that the project wouldn't happen at all without the tax subsidy. . . ."
- b. *Response:*
  - i. The "but for" test does not apply to the proposed Black Creek Mountain TIF because the term of the TIF does not exceed 20 years and the proceeds of the TIF debt will finance only public infrastructure facilities.
  - ii. Under the Uniformity in Tax Increment Financing Act of 2012" a "but for" test (described in Section 9-21-101(2) under the definition "Best interest of the State") must be met in order to implement IDB TIFs if:
    - 1. the TIF period exceeds 20 years (Section 9-23-103)
    - 2. the TIF revenues are applied other than to public infrastructure and certain other related costs (Section 9-23-107).

9. Protection of the Public.

- a. *Ms. Sharp's Statement.* "There is no 'claw back clause' in the Development Agreement to address what happens if the 'economic development doesn't happen. Developers should be required to back up their promises in writing. . . . The Agreement should address what happens if the project hits a major snag due to the economy or other factors. . . ."

- b. *Response:* “Claw back” arrangements are appropriate and often used in payment-in-lieu-of-tax agreements where a company considering locating in a jurisdiction agrees that it is only entitled to reduced or no property tax payments if it makes a required capital investment and/or employs a specified number of people during the relevant tax abatement periods. Claw back arrangements are not commonly seen with TIFs because the benefit to the governmental unit is the TIF improvement, in this case the spine road and sewer improvements. The Developer will advance the funds to build the road and sewer improvements, which will be publicly owned and available, through its purchase of the TIF note and if the Black Creek development does not succeed, the tax increment that is dedicated to the repayment of the TIF note might be insufficient and the Developer will suffer a loss. The public, however, will still have the TIF-financed improvement.

#### 10. Plan Area.

- a. *Ms. Sharp’s statement:* “. . . why does the Plan Area also include land that is not on the mountain, including a 10,000 square foot village center within the existing Black Creek development and the restaurant and banquet facilities at the existing clubhouse? . . .”
- b. *Response:* Section III of the Economic Impact Plan includes an express finding that the entire plan area will benefit from the construction of the public improvements (i.e, road and sewer improvements) contemplated by the Plan. The inclusion of this area also has the effect of shortening the time period required to amortize the TIF note, thus potentially reducing the time the City and County must wait to receive the increased tax revenue.

#### 11. Public Access to Facilities They Are Subsidizing.

- a. *Ms. Sharp’s Statement:* “The existing commercial facilities at Black Creek are available to homeowners and member and not to the general public. It stands to reason that if city and county taxpayer dollars are helping to build this public road up the mountain, the commercial facilities and improvements called for in the Plan should be required to be open to the public. This could be addressed in the Development Agreement.
- b. *Response:* All commercial facilities contemplated by the Plan will be open to the general public.

#### 12. Cost Estimate for the Road.

- a. *Ms. Sharp’s Statement:* “Developer is requesting a tax subsidy in the amount of \$9,000,000for the road and sewer line up the mountain. The ‘Plan’ provides no

information on how they came up with this number and how it is split between the project components. . . . “

- b. *Response:* The Developer based its estimates of the cost of the road and sewer improvements on the extensive experience of its principals with such facilities. One of those principals, Douglass Stein, has extensive road building experience through a family-owned road building company that has operated successfully in Chattanooga and beyond for over 100 years. Mr. Stein’s company will not be the road general contractor and, thus, he has contributed his expertise on behalf of the Developer. The Developer has engaged an independent engineering firm to prepare an estimate, as well as taking budget proposals from at least four contractors.

### 13. Interest Payments Go to the Developers.

- a. *Ms. Sharp’s Statement:* “The loan agreement states that ‘the outstanding balance of the TIF note shall bear interest at a variable rate per annum equal to the Prime Rate, as it may change from time to time, plus 200 basis points.’ The public is the bank through the TIF note and in effect we pay the interest to the Developers.”
- b. *Response:*
  - i. In reality, the Developer is in the position of a bank because it will advance the funds to build the public road and public sewer improvements and will only be repaid, with interest at a reasonable interest rate, if there is economic development in the TIF area and sufficient tax increment revenues are generated to repay the TIF note.
  - ii. Please see the following provisions of the draft Loan Agreement that clearly provide that payments on the TIF notes will only be made from TIF revenues:
    - 1. Section 2.7 of Loan Agreement (page 4), which provides that any unpaid portion of the TIF note is extinguished at maturity (20 years).
    - 2. Section 2.9 of the Loan Agreement (page 5), which provides that the TIF note does NOT represent an obligation of the City.

### 14. Timing.

- a. *Statement:* “Also, the state legislature in their last session pursued amendments to TIF provisions (Public Chapter 605) that become effective July 1. One of the major changes was to increase the oversight of the state on local TIFS. Perhaps Developers were trying to beat this deadline.”

- b. *Response:* Contrary to that statement, the provisions of The Uniformity in Tax Increment Financing Act of 2012 (Public Chapter 605) are fully applicable to the Black Creek Mountain Economic Impact Plan, which complies with The Uniformity in Tax Increment Financing Act of 2012 in all respects. The Developer did not “race” to beat the deadline.

## 15. Precedent

- a. *Ms. Sharp’s Statement:* “If this project is approved without addressing the issues raised in this paper, it would open the door to an endless stream of requests for tax abatement for other general commercial and residential projects. How can you say no to other requests if you approve an unfettered taxpayer subsidy for a new private development that does not substantially leverage job growth or urban redevelopment, the two core principles for tax abatements. . . . “
- b. *Response:* First, to clarify an important point that is obfuscated by Ms. Sharp’s statement: The Black Creek TIF plan does not abate the taxes on any parcel in the Plan Area. Rather, full property taxes on each parcel will be collected by the City and County and the increment described in the Plan (the excess of Plan Area taxes collected over the sum of (i) taxes collected in 2011, (ii) taxes that benefit schools, and (iii) taxes collected to service City and County debt) will be applied to the repayment of the TIF note until the earlier of its payment in full or twenty years. The precedential effect of the approval of the Black Creek TIF will, appropriately be determined by the elected City and County officials. I point out, however, that a significant distinguishing factor between the Black Creek Plan Area and other developments is the need for a spine road as opposed to normal subdivision streets. The Developer has not sought TIF financing for those normal streets.

Thank you very much for the chance to present this memorandum, which I hope you will share with members of the IDB, the City Council and the County Commission.

Please give me a call if you have any questions about the memorandum.