ATTORNEY-CLIENT PRIVILEGED MATTER

MEMORANDUM

TO: Sandy Gbur, WDSRA Executive Director
FROM: Robbins Schwartz - Heidi A. Katz
SUBJECT: Uses of Special Recreation Tax Levy
DATE: July 22, 2013

As requested, this memorandum offers perspectives on legally appropriate uses of the tax levy for special recreation purposes authorized by § 5-8 of the Park District Code (70 ILCS 1205/5-8), by reviewing the text and history of the statute as well as developments which have influenced how some SRAs and member districts view use of the levy. These developments include the federal American with Disabilities Act of 1990 and its non-discrimination and accessibility mandates, the Illinois Property Tax Extension Limitation Law (PTELL) enacted in 1991, and the 1993 amendment of the PTELL by P.A. 93-612 which excluded the § 5-8 levy – uniquely among other local government tax levies – from those subject to the "tax cap".

I. SPECIAL RECREATION LEVY AUTHORITY: TEXT AND CONTEXT

A. General Assembly endorses SRA joint agreements and provides levy authority

In 1969, the General Assembly enacted pioneering legislation which provided the legal impetus for the state's park districts and municipalities to take cooperative action to provide recreation opportunities for residents with disabilities in their communities. Public Act 76-805 amended the Illinois Park District and Municipal Codes to add specific authority for park districts and municipalities to establish and maintain recreational programs for the handicapped, and to enter into agreements with each other to provide joint recreational programs for the handicapped. See Park District Code §§ 8-10a and 8-10b, 70 ILCS 1205/8-10a and 8-10b; Municipal Code §§ 11-95-13 and 11-95-14, 65 ILCS 5/11-95-13 and 11-95-14.[1]

In 1973, the legislature authorized park districts and municipalities which were parties to such a joint agreement to levy an annual tax of up to $0.02 (two cents) per $100 of assessed valuation "for the purpose of funding the district's share of the expenses of providing these programs under that joint agreement". As initially enacted, authority for the § 5-8 levy (or "SRA levy", now found at 70 ILCS 1205/5-8 and 65 ILCS 5/11-95-14) was contingent on referendum approval of the tax by voters. Public Act 79-675 rewrote the levy provisions two years later to remove the referendum requirement. In 1987, P.A. 85-124 increased the tax rate for the SRA levy from .02% to .04%. Neither amendment altered the language specifying the SRA levy's purpose, quoted above.

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[1] The SRA legislation was designed to encourage local governments, acting in concert, to do what they had little incentive and few resources to do as single entities – that is, provide public park and recreation opportunities to the low incidence population of people with disabilities. At the time, there were few sources of statutory protection from discrimination for disabled individuals. With passage of the Rehabilitation Act of 1973, public entities which received federal funds were prohibited from denying a person access to governmental benefits on the basis of his or her disability. Most park districts did not receive federal funding, and therefore were not subject to the Act's provisions.

1990 →

B. Americans with Disabilities Act of 1990 ("ADA")

With the ADA, park district programs and facilities became subject to broad federal prohibitions against discrimination on the basis of disability. SRAs continued to offer programs customized to serve recreation consumers with special needs, but their mission grew to include providing "inclusion services" for participants and member districts in the wake of the ADA's presumption that an individual with disabilities should be enabled at his or her option to participate with reasonable accommodations in park and recreation programs offered to the general population. Complying with the ADA's unfunded mandates for accessible facilities has also challenged the fiscal resources of park districts, municipalities, and other governmental (and non-governmental) entities.

C. PTELL "tax caps" and the "uncapping" of the § 5-8 levy

Compounding the financial challenges facing local governments, the General Assembly in 1991 enacted the Property Tax Extension Limitation Law ("PTELL", 35 ILCS 200/18-185 et seq.). Effective at first only in the "collar" counties but then extended to Cook, the PTELL now applies in any counties whose voters pass a referendum to subject their local non-home rule government units to a limiting rate which generally "caps" annual increases in a district's aggregate tax extension to the percentage increase in the CPI-U for the 12-month period preceding the levy year.

2003 → Beginning with levy year 2003, amendatory legislation excluded the § 5-8 levy from those subject to the PTELL limiting rate, thereby exempting the SRA levy from the "tax cap".

II. OBSERVATIONS AND ANALYSIS

A. Legal and pragmatic concerns raised by expanded uses of the SRA levy

Perhaps inevitably, exemption of the SRA levy from the PTELL limiting rate has led some districts to expand their use of that levy as a way of alleviating the financial constraints resulting from the tax cap. But more "flexible" uses of the SRA tax may come at a price to SRAs: diverting revenues generated by the uncapped § 5-8 levy to purposes not directly related to joint programs tends to diminish the resources which member districts have available and are willing to contribute to the SRA's expenditures for staff, equipment and transportation needed to support special rec programs and services which serve residents with disabilities.

For example, with the acquiescence or concurrence of the SRA to which they belong, many districts now allocate part of their SRA levy proceeds to pay the estimated pro rata cost of district staff time devoted to SRA matters and activities. Likewise, although SRA Articles of Agreement typically oblige member districts to help support joint agreement programs by making their recreation sites and facilities reasonably available to the SRA, the growing demand for park and recreation programming within member district communities – and the need to generate program fees from sites and facilities – has made it more difficult to volunteer contribute use of their facilities for SRA programs on a no-charge basis. One way of dealing with these dynamics has been for individual member districts to allocate and cover part of the "overhead" cost of their facilities used by the SRA, to the special rec levy. When implemented reasonably and pursuant to an SRA Board policy, these uses of the levy can be justified as supporting "expenses of providing programs under" an SRA joint agreement consistent with the levy authority contained in § 5-8.

It has also become common for districts to use SRA levy proceeds to pay expenditures for capital projects which were formerly paid from the general corporate fund or other revenue sources. In some cases, these projects relate only loosely, if at all, to "expenses of providing programs under [the] joint agreement." However, the text of § 5-8 does not authorize use of the levy as a source of revenue for projects which do not relate in any way to or benefit joint agreement programs – even if those projects include features (such as ADA-mandated improvements) which enhance the overall accessibility of park district facilities or programs to individuals with disabilities. The ADA has indeed imposed unfunded mandates on SRA member districts. Nonetheless, its enactment did not alter the longstanding language of Park District Code § 5-8 which specifies the purpose of the SRA levy as being to provide revenues "for programs under" a special recreation joint agreement.[2]

Contrary to a suggestion sometimes made, the scope of this levy authority does not turn on the "spirit or intent" of § 5-8. It is a basic rule of statutory construction that when asked to interpret a law, courts begin by examining its text as the first and best indicator of legislative intent. If the statutory language is clear, they go no further and do not delve into legislative history or seek other clues to intent. The language of the "purpose" clause in § 5-8 is clear, even if (as must be acknowledged) the line between what is and is not an "expense of providing programs under the joint agreement" can be gray.

That said, member districts may apply § 5-8 levy proceeds to fund capital projects including ADA-mandated accessibility improvements, as long as those improvements will directly benefit SRA programs. Making this determination requires looking at the specifics of each project. Although architects and engineers may devise rules of thumb as to what percentage of construction project costs may generally be ascribed to ADA-mandated features, there is no set percentage which can provide a stock answer to the separate question of what part of a particular park district capital improvement project can be funded using SRA levy proceeds. Under § 5-8, the answer to that question depends on whether and to what extent the cost of the project, or elements of the project, can be fairly characterized as "expenses of providing programs under [the] joint agreement."

B. Why the SRA Board should be involved in determining uses of the SRA levy

The language of § 5-8 suggests why an SRA Board should be informed of, and approve in some manner, member districts' proposed uses of the SRA levy for expenditures other than payment of

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[2] Although the legislature has amended § 5-8 on five occasions since 1973, it has not seen fit to expand this particular levy authority into an all-purpose funding mechanism for facility accessibility improvements, ADA-mandated or otherwise – although lawmakers know how to do so, when that is their intent. Compare the tax levy authorized for health life/safety purposes by School Code § 17-2.11, amended as of 1994 by P.A. 88-508 to expressly authorize use of the levy to pay for "handicapped accessibility" [now "disabled accessibility"] improvements to school buildings. And fairly or not, the General Assembly has declined to exempt school tax levies for state-mandated life/safety improvements from the operation of the PTELL, just as it has left tax caps on the levies which other non-home rule units of local government must rely on to fund ADA-mandated accessibility improvements. Extensive reliance on the uncapped § 5-8 levy to fund expenditures arguably outside the scope of its intended use may cause legislators to have second thoughts about the wisdom of excluding the special rec levy from PTELL's limiting rate.

annual contributions which the Board itself assesses under the joint agreement. There are two primary reasons.

First, it is the SRA Board, comprised of and acting by vote of directors representing the respective members, which is responsible to determine and define what programs and services the SRA will provide. Individual districts and their boards do not make this determination. Therefore, the "purpose" test for use of the § 5-8 levy – taxing authority which is available to a park district only because it is a party to special recreation joint agreement – requires that the SRA Board determine whether proposed expenditures do in fact relate to and can reasonably be expected to assist the provision of programs under the joint agreement. In performing this responsibility, the SRA Board is not presuming to "veto" a member district's use of "its" levy, or usurping a member district's prerogatives. The Board is instead functioning in its necessary and complementary role to acknowledge appropriate uses of the special recreation levy, and to ensure on behalf of all the affected member districts that resources intended to support their collective provision of SRA programs and services are not improperly diverted. Recognition of and commitment to the concept of cooperative provision of special recreation programs and services is at the heart of membership in a joint agreement, which state law makes a condition of using the § 5-8 levy.

Second, documenting the SRA Board's express acknowledgment that a district's proposed use of the SRA levy relates to and will support the provision of programs and services under the joint agreement can help to protects member districts against potential tax rate objections challenging the propriety of their use of the § 5-8 levy. Special recreation levies are by no means immune from the scrutiny of would-be tax protesters, as the filing of rate objections to some special recreation levies of park districts in DuPage County illustrates. In fact, the "uncapped" status of the § 5-8 levy, which is graphically apparent on annual tax rate extension reports issued by the county clerks each spring and on the ensuing tax bills, makes it an especially obvious and tempting target for tax rate objectors who view PTELL exemptions as unprincipled erosions of the tax cap law.

C. Sample policy and procedures

As you know, Illinois SRAs have employed varying approaches as regards monitoring and providing SRA Board input into individual member district uses of the SRA levy. However, we do not think all approaches are equally defensible. We recommend that SRA Boards have, adhere to, and periodically revisit a written policy on use of the special recreation levy by member districts to fund expenditures other than payment of the annual contributions which the Board itself assesses under the joint agreement. The policy should include or should be accompanied by procedures designed to ensure that the Board timely receives information from member districts about these additional proposed uses of the levy, and has an opportunity to approve or acknowledge them as expenditures which do, in fact, support joint agreement projects or programs.

The "Special Recreation Levy Use and Policy Guidelines" document which we are sending with this memo reflect what we believe to be a reasonable, albeit conservative strategy for addressing these concerns, in light of the statutory provisions involved and the ongoing potential for challenges to use of the § 5-8 levy. We would be glad to discuss this subject further with you and/or the Board as may be helpful.

Enclosure

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