



YOUNG QUALLS, P.A.
ATTORNEYS AND COUNSELORS AT LAW

216 South Monroe Street
Tallahassee, Florida 32301

Reply To:
Post Office Box 1833
Tallahassee, FL 32302-1833

Telephone: (850) 222-7206
Facsimile: (850) 765-4451

MEMORANDUM

To: Harmony Community Development District Board of Supervisors

From: Young Qualls, P.A.

Date: September 13, 2017

Re: Background and Legal Analysis for True-Up Payment Determination

Question Presented

Is there currently a density reduction payment owed on the unplatted lands within Harmony Community Development District under the True-Up Mechanism described in the Assessment Methodology Reports and in a contractual agreement executed by the Developer and the District?

Answer

Yes. According to the plain language of the relevant documents and Severn Trent's calculations, a current density reduction payment in the total amount of **\$351,667.59** is owed on the unplatted lands.

Further, while not currently due, a density reduction payment in the amount of **\$201,351.55** will be due when the plat for neighborhood M is approved.

Background

This question initially arose because the current Landowner/Developer (Birchwood Acres Limited Partnership, LLLP) has an impending sale of property in Harmony Community Development District. Closing of the sale is set to occur on or around September 27, 2017. The potential purchaser's due diligence raised questions regarding any current and/or potential True-Up obligations.

Analysis

As to the 2015 Bond Series, the Developer and the District executed a document entitled the 2015 Assessment Acknowledgement and True Up Agreement ("2015 True-Up Agreement") at the time that the District issued the 2015 Bond Series to refinance the 2004 Bond Series. See Exhibit B. The pertinent language from that document reads:

1.3 On or about the date hereof, the District is issuing its Capital Improvement Revenue Refunding Bonds, Series 2015 (the "2015 Bonds") to defease the 2004 Bonds and to pay certain costs of acquiring and constructing street lighting and other District Improvements (the "2015 Project"). To repay the 2015 Bonds, the District has pledged the revenues derived by the 2004 Special Assessments. The 2004 Assessments are levied upon the various platted product types as described in the Assessment Methodology Report which provides for a true-up mechanism so that debt on unplatted land never exceeds \$47,046 per acre (the "True-Up Threshold"). Thus, every time a plat is presented, the debt on the land remaining after the plat must remain at or below the True-Up Threshold. If the District determines that the amount of debt on the land remaining after the plat is ever greater than the True Up Threshold, the Landowner/Developer shall remit to the District a density reduction payment (the "True Up Payment") so that the True-Up Threshold is not exceeded and the District will use such payment to redeem or prepay the 2015 Bonds.

* * * *

3.3 True Up Mechanism) From time to time as plats are submitted relating to the Development, the District (with the assistance of the Developer) shall determine the amount of debt remaining on the unplatted land. If the District determines that such debt exceeds the True-Up Threshold, defined above, the District will notify the Landowner/Developer of the amount of the True Up Payment and the Landowner/Developer shall remit immediately the True Up Payment to the District. The District shall use the True Up Payment to redeem or retire a corresponding amount of the 2015 Bonds.

The True-Up Mechanism is described in the referenced 2004 Supplemental Assessment Methodology Report, Exhibit C, which was completed by Severn Trent at the time that the 2004 Bond Series was issued, as follows:

2.6 True-Up Mechanism

In order to assure that the District's debt will not build up on the Unplatted Acres, and to assure that the requirements that the non-ad valorem special assessments will be constitutionally lienable on the property will continue to be met, the District shall determine the following:

To assure that there will always be sufficient development potential remaining in the undivided property to assure payment of debt service after a plat, the following test will be applied. The test is that the debt per acre remaining on the unplatted land is never allowed to increase above its maximum debt per acre level. Initially, the maximum level of debt per acre is calculated as the total amount of debt for the District's improvement program divided by the number of developable acres in the District. In this case it is \$33,290,000 divided by 707.6 acres, equaling \$47,046 per acre. Thus, if the initial debt level is \$47,046 per acre, every time a plat is presented, the debt on the land remaining after the plat must remain at or below \$47,046 per acre. If not, then to approve the plat the District will require a density reduction payment so that the \$47,046 per acre debt level is not exceeded.

Thus, the debt allocation methodology provided above is really a process by which the District can allocate debt to particular parcels of land at the time of platting. The procedures also assure that the debt will not build up on the unplatted properties creating potential assessment problems.

Additionally, the District's performance of the True-Up analysis at the time of platting is discussed in another section of the 2004 Supplemental Assessment Methodology Report:

2.9 Processing Plat at the District Level

Although the District does not process plats for the developer or the County, it does have an important role to play during the course of platting. Whenever a plat is processed, the District must allocate a portion of its debt to the newly platted property according to the methodology outlined above. In addition, the District must also prevent any buildup of debt on unplatted land. Otherwise, the land could be fully platted without all of the debt being allocated. To preclude this, at each plat the District will determine the amount of debt per acre that remains on the unplatted land, taking into account the proposed plat. If the debt per acre on the unplatted property does not increase above its initial level (\$47,046 per acre), then the plat may be approved.

The purpose of a true-up mechanism is to prevent the buildup of debt on undeveloped property that could create future assessment problems. Here, the pertinent documents state that the District is to perform the True-Up analysis every time a plat is “presented” or “submitted.” In Osceola County, landowners are generally required to go through the formal platting process contained in Chapter 177, Florida Statutes, when they wish to subdivide land. Osceola County Land Development Code Chapter 2.1.1(I). Plats must be approved by the local governing body, which in this case is Osceola County, and are recorded following such approval. §§ 177.071, 177.111, Fla. Stat. (2017). Accordingly, we opine that the performance of the True-Up analysis by the District is required anytime that a plat is submitted to and approved by the County and then subsequently presented to the District by the Developer to allow the True-Up analysis to occur.

At the time that a plat is submitted, a certain amount of debt is allocated to the property within that plat. According to the documents, to perform the True-Up analysis the District must then determine if the amount of debt that will be allocated to the property that remains unplatted after the new plat exceeds the per acre threshold. If the per acre threshold is exceeded, the Developer is required to make a density reduction

payment so that the threshold is no longer exceeded. In other words, the Developer is required to “buy-down” the debt on the remaining unplatted properties each time a plat is submitted.

For purposes of illustration: if you had a district made up of 100 acres and the total debt is \$100, your per acre threshold is \$1 per acre. If one neighborhood consisting of 25 acres is then platted and the total amount of the debt allocated to the neighborhood based on the maximum special assessment amount per lot is \$20, then the debt on the remaining 75 unplatted acres is now \$80. $\$80/75$ unplatted acres= $\$1.067$ per acre. The per acre threshold is exceeded on the unplatted acres after the submitted plat. Under the True-Up Agreement, the developer would be required to remit a \$5 density reduction payment to bring the debt per acre amount on the remaining unplatted acres back down to \$1. $\$80-\$5=\$75$. $\$75/75$ unplatted acres= $\$1$ per acre.

To date, the District has never required a density reduction payment on the lands subject to the 2015 Bonds pursuant to the True-Up Mechanism. In 2007, large tracts of land subject to the 2015 (then 2004) Bonds were platted (including neighborhoods J, K, & L). Exhibit D. Additionally, two replats of some of the land included in the 2007 plat were also submitted and recorded in 2015 and 2016 (neighborhoods I & O-1), after the execution of the 2015 True-Up Agreement. Exhibits E & F. It is our opinion that the True-Up analysis should have been performed at the submission of each of those plats to the District. It is also our opinion that a density reduction payment would have been

due in 2007¹ (and, consequently, in 2015 and/or 2016) because the \$47,046 per acre threshold would have been exceeded on the unplatted lands following the 2007 plat.

According to Severn Trent's calculations, the debt per acre on the unplatted lands subject to the 2015 Bonds currently exceeds the \$47,046 threshold. See Exhibit A (Excel Spreadsheet Tab 1). The 2015 True-Up Agreement states that: "If the District determines that the amount of debt on the land remaining after the plat is **ever** greater than the True Up Threshold, the Landowner/Developer shall remit to the District a density reduction payment (the "True Up payment") so that the True Up Threshold is not exceeded and the District will use such payment to redeem or prepay the 2015 Bonds." 2015 True-Up Agreement § 1.3 (emphasis added). Additionally, the Agreement states that: "If the District determines that [the debt on the unplatted acres] exceeds the True-Up Threshold, defined above, the District will notify the Landowner/Developer of the amount of the True-Up Payment and that Landowner/Developer shall remit **immediately** the True-Up Payment to the District." 2015 True-Up Agreement § 3.3 (emphasis added).

Based on that language, we would recommend that the District now determine that the amount of debt on the unplatted acres remaining after the last plat (neighborhood O-1) exceeds the True-Up Threshold and a density reduction payment is immediately required. According to Severn Trent's calculations, the amount of the

¹ We do not know the exact payment that would have been due in 2007. We have been advised by Severn Trent that going back to 2007 to determine this number would require a full forensic analysis which could not occur prior to the September 14, 2017 meeting or before the Developer's scheduled closing. However, it is our belief that the payment that would have been due in 2007 would have been higher than what is due today even if the number of "unplatted" acres is the same. This is because since 2007, there has been ten years' worth of debt servicing paying down the principal amount of the debt.

density reduction payment required to buy-down the debt on the unplatted acres subject to the 2015 Bonds is **\$351,667.59**.²

When this question initially arose, there was some discussion about amending the 2015 True-Up Agreement to raise the amount of the True-Up Threshold—thus, reducing or possibly eliminating a density reduction payment on the unplatted lands subject to the 2015 Bonds. This is still an option that the Board could pursue. However, it would not be our recommended course of action because obtaining an amendment to the 2015 True-Up Agreement requires obtaining an opinion of bond counsel and the majority consent of the 2015 bondholders. Securing those two items would be a costly and time-consuming endeavor. Additionally, it is our opinion that raising the True-Up Threshold amount is not the proper method to remedy the buildup of debt above the True-Up Threshold that has occurred on the unplatted acres as described in the Assessment Methodology Report. Pursuant to the pertinent documents, requiring a density reduction payment under the True-Up Mechanism is the proper method to remedy the buildup of debt.

As to the lands subject to the 2014 Bonds, a draft plat for neighborhood M has been submitted to Severn Trent and is in the early process of being submitted for approval and recording by Osceola County. Utilizing the same True-Up Mechanism and

² At the last meeting, the Board will recall that there was discussion that the amount due exceeded \$2,000,000.00. There was some initial confusion between Severn Trent and the Developer as to what constituted “platted” or “unplatted” lands for the purposes of this analysis. The \$2 million figure was derived by including some parcels that have in fact been platted (*i.e.*, J, K, & L neighborhoods) into the equation as “unplatted” properties. However, according to the plain language of the pertinent documents, these neighborhoods should not be included in the category of “unplatted” lands for the purposes of the True-Up analysis because plats for those lands have been submitted to and approved by Osceola County and now—at the latest—submitted to the District by the Developer.

the same \$47,046 True-Up Threshold, Severn Trent has determined that the Threshold will be exceeded on the unplatted acres following the platting of neighborhood M. Based on the proposed plat in its current form, Severn Trent has calculated that a density reduction payment in the amount of **\$201,351.55** will be due and payable after the plat of neighborhood M. See Exhibit A (Excel Spreadsheet Tab 2).

The same True-Up Threshold contained in the 2004 Supplemental Assessment Methodology applies to the lands subject to the 2014 Bonds. This is because each time a supplemental assessment methodology report is completed to accompany the issuance of a new bond series, the True-Up Threshold is recalculated by taking the entire amount of the bonds that are being issued and that have previously been issued and dividing that total amount by all of the acres in the District. Accordingly, the \$47,046 True-Up Threshold included in the 2004 Supplemental Assessment Methodology Report took into account the 2001 (now 2014) Bonds. If the Threshold is calculated based on the entire amount of the debt and the entire number of acres, the only logical conclusion is that the same Threshold applies to all of the lands in the District, regardless of the bond series to which those lands are subject. The 2004 Supplemental Assessment Methodology Report is the most recent supplemental assessment methodology report. It therefore contains the most recent and accurate True-Up Threshold figure.

The True-Up Mechanism as described in the 2004 Supplemental Assessment Methodology Report is the controlling document as to the lands subject to the 2014 Bonds because there is no additional agreement (like the 2015 True-Up Agreement) executed by the District and the Developer. The 2004 Supplemental Assessment

Methodology Report speaks to the True-Up test that the District must apply and states that if the True-Up Threshold is exceeded, “then to approve the plat the District will require a density reduction payment.” 2004 Supplemental Assessment Methodology Report § 2.6. Unlike the 2015 True-Up Agreement, this language does not specifically address *when* the density reduction payment is due. Going forward, we would suggest that the District should require the density reduction payment to be due when the plat is finally approved for recording by the County and subsequently presented to the District. This is because it is possible that the draft plat submitted to the County for approval could change prior to final approval and recording or not be approved at all. If the District were to “approve” the plat and require a density reduction payment prior to the County’s final approval and recording, it is possible that the density reduction payment required could be inconsistent with the final plat.

Accordingly, we would suggest that the District may only make a preliminary determination at this time that if the proposed plat for neighborhood M is approved in its current form, a density reduction payment in the amount of **\$201,351.55** will be due once the plat is finally approved and recorded because the Threshold for the unplatted acres subject to the 2014 Bonds will be exceeded. This amount would be subject to change depending on any changes to the proposed plat.

Conclusion

Based on the pertinent legal documents, each time a plat is submitted, the District must determine whether the debt remaining on the unplatted acres exceeds a certain per acre debt threshold. If the District determines that the per acre debt threshold is exceeded, the District shall require a density reduction payment from the

Developer so that the per acre debt threshold is no longer exceeded on the unplatted acres. This True-Up analysis should have been performed each time there was a plat submitted for lands in the District.

To date, the District has not made such a determination and required a density reduction payment pursuant to the True-Up Mechanism described in the Assessment Methodology Reports or the 2015 True-Up Agreement. However, we would recommend that because the debt per acre threshold is currently exceeded on the unplatted acres subject to the 2015 Bonds, the District should now determine that the Threshold has been exceeded and that a density reduction payment is immediately due and payable under the terms of the 2015 True-Up Agreement. If a density reduction payment in the total amount of **\$351,667.59** is remitted, then the True-Up Mechanism and 2015 True-Up Agreement will be satisfied because the debt on the unplatted acres will no longer exceed the True-Up Threshold.

Moving forward, we would suggest that the District perform the True-Up analysis when plats are submitted for approval and recording to the County and subsequently presented to the District and that the density reduction payment be due when such plat is approved and recorded in its final form.