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Client Alert: What Takes Priority – a TIF Exemption or Another Exemption? The Ohio Supreme Court Weighs In

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Two important aspects of every tax increment financing (TIF) project in Ohio are (i) determining whether the TIF exemption or another exemption should take priority when two exemptions apply to the same property, and (ii) taking the steps necessary to implement the preferred priority. Today, the Ohio Supreme Court weighed in on one aspect of the foregoing in *Fairfield Twp. Bd. of Trustees v. Testa*, Slip Opinion No. 2018-Ohio-2381 (*Fairfield Twp.*).

Before delving into the details of *Fairfield Twp.*, we will summarize these two aspects of every TIF project. In general, TIF in Ohio is an exemption from real property taxes on increased real property value combined with an obligation to make equivalent payments in the same amount and manner as real property tax called TIF service payments. In general, TIF service payments are used for a group of eligible costs defined as “public infrastructure improvements.” When another exemption applies to the same property, such as a charitable-use exemption, the taxing authorities must determine which exemption takes priority – the TIF exemption, which is accompanied by an obligation to make TIF service payments, or the other exemption, which is not accompanied by an obligation to make TIF service payments.

For years, TIF practitioners would determine the parties' preferences when undertaking a TIF project and implement those preferences largely through the recording of appropriate instruments to put future property owners on notice regarding the priority approach. In 2004, when the existence of a TIF exemption caused a church to be denied an exemption that otherwise would have been available to it as a “house of public worship,” the Ohio General Assembly enacted Ohio Revised Code Section 5709.911 (“R.C. 5709.911”). R.C. 5709.911 set forth a logical series of rules that parties could follow when establishing TIF areas to institute the preferred priority approach. Those rules are carefully considered by experienced TIF practitioners – particularly when the underlying TIF legislation does not specify that TIF exemptions are subordinate in all cases to certain other types of exemptions. In general, R.C. 5709.911 specifies that the TIF exemption

takes priority over all other exemptions when a TIF exemption application is filed by the property owner or by the political subdivision with the written consent of the property owner. Moreover, so long as an appropriate notice is filed with the county recorder after the Ohio Tax Commissioner approves a TIF exemption with priority over other exemptions, the TIF exemption continues to have priority over other exemptions even after property within the TIF area is conveyed to a new property owner.

In *Fairfield Twp.*, the Court considered a situation in which the TIF area was established before the enactment of R.C. 5709.911 and the current property owner wished for a subsequent exemption to have priority. The existence of the TIF exemption and the accompanying obligation to make TIF service payments was established in a recorded covenant, but because R.C. 5709.911 did not exist when the TIF area was established, the priority rules set forth in R.C. 5709.911 were not followed. In addition, although the legislation pursuant to which R.C. 5709.911 was enacted contained uncodified language that set forth steps that would have enabled the township to confirm the priority of the TIF exemption, those steps were not taken. The township argued that the recorded covenant should control. The Court, however, found that because the covenant was contrary to the priority rules set forth in R.C. 5709.911, the covenant was unenforceable. Accordingly, the court held that the TIF exemption was subordinate to the other exemption, which, ironically given the history of R.C. 5709.911, was an exemption for a house of public worship.

If you have any questions regarding how R.C. 5709.911 or *Fairfield Twp.* may impact a TIF project in which you are involved, please contact Scott Ziance (614.464.8287 or sziance@vorys.com) or Chris Clements (614.464.5427 or cjclements@vorys.com).