



Dykema Gossett PLLC
39577 Woodward Avenue
Suite 300
Bloomfield Hills, MI 48304
Tel: (248) 203-0700
Fax: (248) 203-0763
www.dykema.com

TO: Tom Crawford, Chief Financial Officer
City of Ann Arbor

FROM: Dykema Gossett PLLC

RE: Bond Financed Public Parking Facilities / Private Business Use Test

DATE: August 9, 2012

Introduction:

This memorandum is intended to provide general information with respect to the limitations on “private business use” of the City of Ann Arbor’s parking facilities financed with outstanding federally tax-advantaged bond issues (i.e., tax-exempt and tax credit bond issues).

The City currently has seven (7) public parking decks in its downtown business area, generally referred to as Fourth & William, Library Lane, Fourth & Washington, Forest, Maynard, Liberty Square and Ann/Ashley, along with surface parking lots and hourly metered parking (collectively, the “Parking System”). Several of these decks were financed in whole or part with currently outstanding tax-exempt (or tax credit) bond issues (the “Bond Financed Decks”).

Under federal tax rules applicable to facilities financed with tax-advantaged bonds, such bonds may lose their favorable tax treatment if (a) more than 10% of the bond financed portion of the facility is deemed to be used for private trade or business (the “private business use test”) and (b) more than 10% of debt service on such bonds is payable from and/or secured by private business payments or security (the “private payment/security test”). If both tests are met, the bonds would be deemed “private activity bonds” and become federally taxable (or lose the credit subsidy); if only one of the two tests is met, the bonds remain tax-advantaged.

This memorandum is limited to review of the “private business use test” as applied to the Bond Financed Decks. Avoidance of private business use is the most straightforward way of assuring

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that the tax status of bonds is not adversely affected.¹ Analysis of the “private payment test” tends to be substantially more complex and is heavily fact-specific.

It should be noted that the 10% business use test is computed separately for each bond issue the proceeds of which were used to construct a Bond Financed Deck. Each of the decks originally was financed by a single issue. If two or more issues were refunded by a refunding issue, the 10% test should be applied to the decks built with the proceeds of the refunded bonds collectively, rather than to each deck separately.

It should further be noted that the 10% threshold is not a limit for each private business user, but a cumulative limit for all private business users of a parking facility.

Background:

The Parking System is operated and maintained by the City’s Downtown Development Authority (“DDA”) pursuant to a Parking Agreement, dated July 1, 2011, between the City and the DDA. The DDA has operated and maintained the Parking System pursuant to predecessor agreements since 1992. The DDA has entered into one or more management agreements with private companies for operation of certain parking facilities, which agreements have terms of five (5) years or less, with compensation based on fixed fees and cost reimbursement.

All of the parking decks provide a certain amount of parking for “in and out” usage based on hourly rates. Most of the decks also provide for monthly permit parking. The DDA does not issue permits for time periods longer than one month. The DDA fixes the number of monthly permits available and sets the permit rates for each deck individually. The number and pricing of available permits thus varies among the several decks, being adjusted from time to time to maximize the overall usage and efficiency of the Parking System, and to accommodate the needs of regular users of the Parking System (e.g., business district workers and businesses) and those of hourly in-and-out users (e.g., retail shoppers). The rates for each deck are uniformly applied within each user category (e.g., hourly, monthly permit holder).

The DDA manages a system-wide application system for issuance of the monthly permits for deck parking. An applicant may apply for a monthly permit in a particular deck. If no permits are currently available for the requested deck, the applicant may be assigned a permit in a different deck. Some decks have monthly permit waiting lists.

¹ It is possible that the second required test for taxability (the “private payment/security test”) would not be met, based on the manner and extent to which system-wide revenues from non-bond financed facilities (decks, surface lots and metered parking) are collectively pooled with revenues from the Bond Financed Decks to fund debt service on the outstanding bonds.

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The holders of permits have the option (sometimes referred to as a first refusal right) to renew the permit each month, at the then applicable rate for monthly permits (which is an automatic process, unless the holder elects not to renew). The City (DDA) retains the right to cancel each permit at the end of each monthly period, and may also reassign the holder to a different deck at such time.

In most cases, monthly permits are applied for, paid for and issued in the names of individuals, as opposed to businesses. In a limited number of cases, businesses have applied for permits for use by employees. In some cases such permits have been issued in the name of the business and in other cases in the names of the employees. Payment for such permits has similarly varied as to whether payment is made by the employer as a bulk payment or by the employee.

Private Business Use – Principal Exception:

General Public Use Exception. Private business does not include use by the general public. Use of a facility by “non-governmental persons”² in their trades or businesses will be treated as “general public use” only if the facility is intended to be available (and is reasonably available) for use on the same basis by natural persons who are not using the facility in connection with a trade or business. “Use on the same basis” means use available to the general public at rates that are generally applicable and uniformly applied, and without priority rights or other “special legal entitlements”. The rates may allow for customary and reasonable differences to take into account different classes of users, such as hourly and monthly permit users.

By way of example, applying the general public use rule, if the conditions described in the preceding paragraph are met, and it happens that more than 10% of the employees of a particular business routinely park in one bond-financed parking structure under the City’s monthly permit system (as a result of proximity and similar factors affecting parking choices by the general public), such use would not constitute private business use.

200-Day Rule. Arrangements may be entered into with a private business allowing for parking permits for a Bond Financed Deck, and still fall within the general public use exception (thus not counting as private business use), if:

- a. the conditions described above for general public use property are otherwise met;
- b. the term of the arrangement is no greater than 200 days (renewal options count against the 200 day limit; however, a priority right to renew, such as under the City’s monthly

² Non-governmental persons includes both entities and natural persons.

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permit system, is not counted as a renewal option if the usage fees are subject to readjustment at the time of renewal based on then applicable fair market value rates); and

- c. the facility is *predominantly* used under the same or similar arrangements by natural persons who are not engaged in a trade or business.

Other Exceptions. There are various other exceptions (e.g., the 50-day, 100-day, “developer temporary use” and “incidental use” exceptions). In light of the City’s current hourly and monthly permit parking arrangement policies, and the applicability of the general public use exception and the 200-day rule, we have not included a discussion of these other exceptions. If the City’s parking policies change in any material way, those exceptions might then become relevant and should be reviewed.

Conclusions:

The City’s current monthly permit system, described earlier, falls within the “general public use” exception of the Treasury Regulations.

There is some flexibility, within the limits of the 200-day rule requirements, for parking arrangements with private business entities, providing for longer than monthly terms in the Bond Financed Decks.

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The application of the private business use test can involve considerable intricacy in different fact situations. This memorandum is intended to provide basic information, and to highlight the private business use “safe harbors” most relevant to the Parking System.

AI/slsh