

STATE BOARD OF ACCOUNTS
302 West Washington Street
Room E418
INDIANAPOLIS, INDIANA 46204-2769

EXAMINATION REPORT
OF
REDEVELOPMENT COMMISSION
CITY OF RISING SUN
OHIO COUNTY, INDIANA
January 1, 2006 to December 31, 2006



FILED
12/31/2007

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CITY OFFICIALS

<u>Office</u>	<u>Official</u>	<u>Term</u>
Clerk-Treasurer	Rae Baker Gipson	01-01-04 to 12-31-07
Mayor	William A. Marksberry	01-01-04 to 12-31-07
President of the Redevelopment Commission	Cecelia Berry	01-01-06 to 12-31-07



STATE OF INDIANA
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TO: THE OFFICIALS OF THE CITY OF RISING SUN

We have examined the records of the Redevelopment Commission for the period from January 1, 2006 to December 31, 2006, and certify that the records and accountability for cash and other assets are satisfactory to the best of our knowledge and belief, except as stated in the Examination Result and Comment.

STATE BOARD OF ACCOUNTS

December 19, 2007

REDEVELOPMENT COMMISSION
CITY OF RISING SUN
EXAMINATION RESULT AND COMMENTS

FUNDS ADMINISTERED BY NOT-FOR-PROFIT CORPORATION

We received information that a not-for-profit-corporation was administering Redevelopment Commission funds. The following information is based on our review of agreements, financial information and inquiries of City officials:

Background Information

The City of Rising Sun, along with the Redevelopment Commission, entered into a Project Agreement with Rising Sun Riverboat Casino and Resort, LLC., (Developer) on November 7, 1994. The purpose of the agreement was to set out certain terms and conditions regarding the Developer's proposed development of a riverboat gaming facility to be located in the City of Rising Sun.

Section 3(o) titled "Developer's Obligations" states in part: ". . . Developer shall set aside . . . \$3,500,000 to and for the benefit of the Redevelopment Commission . . . for a grant and revolving loan fund for downtown redevelopment and improvements. . . . Developer shall pay to the City of Rising Sun . . . the amount set aside as is then necessary to pay for the costs of implementing the Redevelopment Plan."

Item 7 of the First Amendment to the Project Agreement dated January 4, 1996, states in part: "Local Government has created a non-profit Indiana corporation named Rising Sun/Ohio County First, Inc. The Local Government hereby directs Developer to make payments as may be required . . . directly to the Non-Profit instead of to the Local Government . . ."

Administration of Funds

Approximately \$3,500,000 was paid to Rising Sun/Ohio County First, Inc., (RSOCF), a not-for-profit corporation, prior to the year 2006.

The Articles of Incorporation state that RSOCF is a public benefit corporation and was formed for the purpose of to support and benefit the City of Rising Sun and Ohio County and counties contiguous with Ohio County. Specific purposes related to the Redevelopment Commission include the following:

1. To redevelop and provide for economic development.
2. To undertake a loan program to any persons or entities for redevelopment and economic development purposes.

The incorporators of RSOCF were a former Mayor of the City of the Rising Sun and the former Chairman of the Redevelopment Commission.

The Board of Directors consists of five members. The Board of Directors as of December 19, 2007, consisted of the Mayor; three members of the Redevelopment Commission; and an Ohio County Councilman.

REDEVELOPMENT COMMISSION
CITY OF RISING SUN
EXAMINATION RESULT AND COMMENTS
(Continued)

Financial Activity

We requested and received authorization to review RSOFC financial records for the year 2006. The primary financial activity during the year 2006 consisted of making loans and expenditures related to the maintenance of buildings owned by RSOFC.

The following is a schedule of assets administered by RSOFC related to the Redevelopment Commission as of December 31, 2006 based on financial records presented for examination:

<u>Assets</u>	<u>12-31-06</u>
Cash and investments	\$ 232,400
Loans receivable	<u>1,358,983</u>
Total	<u>\$ 1,591,383</u>

RSOFC also has capital assets such as buildings that were acquired from the proceeds of Developer payments. However, a listing of capital assets with historical or estimated historical costs information was not presented for examination.

Recommendations Based on Statutory Considerations

The original Project Agreement required the Developer to make payments to the City. These payments were not made to the City. The Developer payments were made to a not for profit corporation incorporated by City officials as directed by Item 7 of the First Amendment to the Project Agreement.

We consider the payments made by the Developer to RSOFC to be public funds. There are numerous statutes regarding the accounting for public funds. We considered the following statutes in determining whether we would recommend that assets currently administered by RSOFC should be transferred to the control of the City:

1. City funds are required to be accounted for by the Clerk-Treasurer unless otherwise specified by statute.

Indiana Code 36-4-10-2(c) states in part: ". . . the city clerk-treasurer is the fiscal officer of each third class city.

Indiana Code 36-4-10-4.5(b) states in part: "The fiscal officer is the head of the city department of finance. The fiscal officer shall do the following:

- (1) Receive and care for all city money and pay the money out only on order of the approving body.
- (2) Keep accounts showing when and from what sources the fiscal officer has received city money and when and to whom the fiscal officer has paid out city money.

REDEVELOPMENT COMMISSION
CITY OF RISING SUN
EXAMINATION RESULT AND COMMENTS
(Continued)

2. Public funds are subject to examination by the State Board of Accounts.

Indiana Code 5-11-1-9(a) states: "The state examiner, personally or through the deputy examiners, field examiners, or private examiners, shall examine all accounts and all financial affairs of every public office and officer, state office, state institution, and entity."

We recommended that City official request that all financial assets held on behalf of the Redevelopment Commission be transferred to the City and accounted for on the financial records of the Clerk-Treasurer.

REDEVELOPMENT COMMISSION
CITY OF RISING SUN
EXIT CONFERENCE

The contents of this report were discussed on December 19, 2007, with Rae Baker Gipson, Clerk-Treasurer; William A. Marksberry, Mayor; Cecelia Berry, President of the Redevelopment Commission; and Lane Siekman, City Attorney. The official response has been made a part of this report and may be found on pages 8 through 13.



December 28, 2007

WRITER'S DIRECT NUMBER: (317) 236-2453
WRITER'S DIRECT FAX: (317) 592-4781
INTERNET: Kay.Fleming@icemiller.com

Charles W. Pride, Supervisor, Cities, Towns and Libraries
Indiana State Board of Accounts
302 W. Washington Street
Room E418
Indianapolis, IN 46204

Re: Audit of the Rising Sun Redevelopment Commission

Dear Mr. Pride:

This letter is being submitted on behalf of the City of Rising Sun, Indiana ("City" or "Rising Sun"). As you are aware Todd Knobbe with the State Board of Accounts conducted an audit on the Rising Sun Redevelopment Commission. Mr. Knobbe conducted the exit interview with Rae Gipson, the Clerk-Treasurer for the City, William Marksberry, Mayor of the City, Lane Siekman, City Attorney, and Cecilia Barry, a member of the Rising Sun Redevelopment Commission ("Commission"). Since this is the first year the State Board of Accounts has conducted an audit of the Commission the City wanted to take the opportunity to provide additional background information for consideration by the State Board of Accounts.

As indicated, the \$3.5 million that provided funds the Commission was to administer came from Grand Victoria Casino & Resort, LP, formerly known as Rising Sun Riverboat Casino and Resort, LLC ("Grand Victoria") pursuant to a Project Agreement made by and among the City, the Commission, Grand Victoria and other parties (collectively, "Project Agreement Parties") on November 7, 1994, ("Project Agreement"). Specifically, section 3(o) of the Project Agreement required Grand Victoria to set aside \$3.5 million "to and for the benefit of the Redevelopment Commission of the City of Rising Sun, Indiana" for downtown redevelopment and improvement. On January 4, 1996, the Project Agreement Parties executed the First Amendment to Project Agreement ("First Amendment"). The First Amendment indicated the City, Commission and the Rising Sun/Ohio County Port Authority had "created a non-profit Indiana corporation named Rising Sun/Ohio County First, Inc. (the "Non-Profit")" The First Amendment further directed Grand Victoria to make the balance of the \$3.5 million dollar payment to the Non-Profit.

The Indiana Riverboat Gambling Act passed in 1993. Thus, at the time the Project Agreement Parties negotiated the Project Agreement riverboat gaming was new to the State of Indiana and there was little guidance on the structure of contracts similar to the Project Agreement. At that time there was no legislation specifying that any funds paid pursuant to a

contract similar to the Project Agreement are public funds. It was not until 2005 that IC 36-1-8-9 was amended to specify that :

- (a) Each unit that receives . . .
 - (3) revenue under a development agreement (as defined in [IC 36-1-8-9.5]) may establish a riverboat fund. Money in the fund may be used for any legal or corporate purpose of the unit.
- (b) The riverboat fund established under subsection (a) shall be administered by the unit's treasurer, and the expenses of administering the fund shall be paid from money in the fund. Money in the fund not currently needed to meet the obligations of the fund may be invested in the same manner as other public funds may be invested. Interest that accrues from these investments shall be deposited in the fund. Money in the fund at the end of a particular fiscal year does not revert to the unit's general fund.

The amendments regarding the use of riverboat development funds had not been enacted in 1996 when the City established the Non-Profit. Nor were the amendments enacted when the Commission adopted Resolution 1996-2 to create the Revolving Loan Fund and the Revolving Loan Fund Administration Board ("Board") to establish the manner in which \$1 million, the amount allocated to the Revolving Loan Fund, could be extended or loaned to businesses that would locate or expand operations in Rising Sun.

The Board administered the Revolving Loan Fund from 1996 through 2007 (changes made in 2007 will be discussed in more detail below). After the Non-Profit was established the City asked the State Board of Accounts if the Non-Profit would need to be audited. The State Board of Accounts verbally advised the City that the Non-Profit would not be the subject of a State Board of Accounts audit. However, the Revolving Loan Fund was the subject of annual audits that were conducted on the Non-Profit by John L. Race, Certified Public Accountant.

In late 1999 the Board was concerned about the applicability of the Open Door Law, IC 5-14, to the Revolving Loan Fund. Thus, the Board requested its local counsel, Comer Day & Ertel, review the issue. In a memorandum dated November 5, 1999, John Ertel concluded the Revolving Loan Fund was not subject to the Open Door Law. Mr. Ertel reached this conclusion, in part, on the fact that the Revolving Loan Fund was not subject to audits by the State Board of Accounts. The memorandum (a copy of which is attached) additionally reflects the fact Mr. Ertel contacted Steve Key, Hoosier Press Association, and Ann O'Connor, Indiana Public Access Counsel. Mr. Key did not believe the Revolving Loan Fund would be subject to the Open Door Law while Ms. O'Connor leaned toward a conclusion the Revolving Loan Fund would be subject to the Open Door Law. However, both Mr. Key and Ms. O'Connor stated they were not certain whether or not the Revolving Loan Fund would qualify as a public agency and, thus, be subject to the Open Door Law.

Mr. Charlie Pride
December 28, 2007
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In June 2007 a Revolving Loan Fund recipient submitted requests for various Revolving Loan Fund records pursuant to the Indiana Public Records Law, IC 5-14. At that time the City requested outside counsel, Ice Miller LLP ("Ice Miller"), to review the issue. Ice Miller advised the City it did not appear the Commission had the statutory authority to establish the Revolving Loan Fund.

Thus, on September 6, 2007, the Rising Sun Common Council, pursuant to Ordinance 2007-5, re-established the Revolving Loan Fund Board. After discussing the matter with Ice Miller the City determined it would have the funds and the administration of the Revolving Loan Fund and related repayments transferred to the Clerk-Treasurer's office. The City plans to make these changes in early 2008.

If you have any questions or need additional information please let me know. Thank you for your consideration of this matter.

Very truly yours,

ICE MILLER LLP



Kay Fleming

Enclosure

cc: Mayor Marksberry
Rae Gipson
Redevelopment Commission
City Files

MKF/ dmj
2058372.2

**COMER DAY & ERTEL**NEEL R. COMER
TIMOTHY B. DAY
JOHN A. ERTEL

ATTORNEYS AT LAW

115 West Ripley Street, Osgood, Indiana 47037 Telephone (812) 689-4444 Facsimile (812) 689-3243

TO: Rising Sun Revolving Loan Board
Dale Siekman
April Hautman
Rae Gipson
Barb Bruxton
Ann Tribble

FROM: John A. Ertel *J.A.E.*
Attorney for Rising Sun Revolving Loan Fund

DATE: November 5, 1999

RE: Open Door Law Access

It has come to my attention that persons in the community have raised the issue as to whether the Rising Sun Revolving Loan Fund is a public agency that requires public access to its minutes, records and meetings. For the most part, public agencies are defined as any board, commission, department, agency, authority or other entity by whatever name designated exercising a portion of the executive, administrative or legislative power of the state. This could include counties, townships, school corporations, cities, towns, political subdivisions or other entities by whatever name designated exercising a limited geographical area the executive, administrative or legislative power if the state or delegated local governmental power. It also includes any entity which is subject to either budget review by either the State Board of Tax Commissioners or the governing body of a county, city, town, township or school corporation or by an audit by the State Board of Accounts. A public agency can also be any advisory commission, committee or body created by statute, ordinance or executive order to advise the governing body of a public agency, except medical staffs or the committees of any such staff.

While there may be an argument that the Rising Sun Revolving Loan Fund amounts to a public agency, it does not seem that the Revolving Loan Fund fits any of the definitions specifically described under Indiana Code 5-14-1.5-2. Additionally, a governing body means two or more individuals who are: 1) a public agency that is a board, a commission or an authority; and 2) a counsel committee a body or other entity and takes official action on public business. While the definitions of a governing body more closely define what the Rising Sun Revolving Loan Fund is, it does not apply if you do not determine that the board or organization is a public agency. At this point, I do not believe that the Rising Sun Revolving Loan Fund would be considered a public

Rising Sun Revolving Loan Committee
November 5, 1999
Page 2

agency. However, I have contacted Steve Key with the Hoosier Press Association and Ann O'Connor who is the Public Access Counselor for the Indiana Attorney General's Office. After speaking with both persons and reviewing the facts of how the Rising Sun Revolving Loan Fund was established, how it operates and what it entails, Steve was of the opinion that the Revolving Loan Fund was not a public agency and therefore, not subject to the Open Door laws while Ann leaned more toward an opinion that it is a public agency. Ultimately, both parties stated they were not certain as to whether or not we qualify as a public agency subject to the Open Door laws and could only hint or suggest that we were or were not.

One of the most persuasive factors, in my opinion that will help determine whether or not we are a public agency subject to the Indiana Open Door law stems from the project agreement of November 7, 1994 between the City of Rising Sun, the Rising Sun/Ohio County Port Authority, the Redevelopment Commission and the Rising Sun Riverboat, Casino and Resort, L.L.C., and the State of Indiana wherein it was agreed that the developer would set aside from the proceeds of the first draw on the funding of the project \$3,500,000.00 to and for the benefit of the Redevelopment Commission of the City of Rising Sun for a grant revolving loan fund for downtown redevelopment and improvements. In a first amendment to the project agreement executed on January 4, 1996 it was specifically agreed that the developer would advance up to \$500,000.00 of the \$3,500,000.00 redevelopment fund pursuant to paragraph 3 of the agreement and it was acknowledged that said amounts of money pursuant to the agreement that the advance payment would not accelerate the requirement for any payments pursuant to the agreement and that neither local government nor the non-profit entity known as Rising Sun/Ohio County First, Inc., a not for profit Indiana corporation would have any obligation to repay all or any portion of the advance. The developer and local government agreed that the balance of \$3,500,000.00 redevelopment fund would be set aside pursuant to paragraph 3(o) and would not be set aside or delivered until such time as the amounts are otherwise due as pursuant to terms of the project agreement is hereby modified.

This was a funding for public good by a private entity. Additionally, all of said monies are held by the Rising Sun/Ohio County First, Inc., an Indiana Not for Profit Corporation and that as a result of the Rising Sun Revolving Loan Fund not actually having access to said monies seems to show that we merely act as an advisory group to help the members of Rising Sun/Ohio County First, Inc., review loan applications and requests and determine whether said requests have sufficient capital to justify making a loan and what the appropriate duration of said loan should be. The Rising Sun Revolving Loan Fund operates much like a board of directors or loan officers at a bank and it is the opinion of this attorney that since there is a substantial amount of information that is private and confidential in nature that said information should not be disclosed to the public as it is private and confidential in nature.

Rising Sun Revolving Loan Committee
November 5, 1989
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Since it has not been concluded that the Rising Sun Revolving Loan Fund is subject to the Open Door law, it may be best for the Fund to continue its operation as it has in the past keeping all information regarding the meetings, loan applicants, financial information and decisions of the Revolving Loan Fund confidential. In the event that it is determined this group or the Revolving Loan Fund is considered to be a public agency, then waivers and a release for information should be inserted onto every loan application so that all loan applicants realize and understand that their financial information may become disseminated to the public as a result of the Open Door law. At this point in time, I believe it would be prudent to continue operating as we have in the past keeping loan applicants individual private information confidential and not opening the minutes of the Revolving Loan Fund to the public.

The consequences of a violation of the Open Door law are that an action may be filed by any person in any court of competent jurisdiction to obtain a declaratory judgment; enjoin continuing, threatened or future violations of the Open Door law; or declare void any policy, decision or final action that was taken by a public agency in violation of the Open Door law. In any action filed under this section, a Court shall award reasonable attorney's fees, court costs, and other reasonable expenses of litigation to the prevailing party if the plaintiff prevails; or the defendant prevails and the Court finds that the action is frivolous and vacuous.