

# THE BOND BUYER

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## Lawyer: IRS Position on Village Center CDD is Turnaround

by [Lynn Hume](#)

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WASHINGTON — Internal Revenue Service officials are taking a position in the tax dispute over \$427.2 million of bonds issued by the Village Center Community Development District that they previously said they would not take, according to the CDD's lawyer.

Perry Israel, the lawyer representing the Village Center CDD, made this assertion in letters and documents sent Tuesday to Rebecca Harrigal, the new director of the IRS' tax-exempt bond office, and Helen Hubbard, IRS associate chief counsel for financial institutions and products.

Israel said past IRS statements and actions make clear that the Service should either withdraw the technical advice memorandum it issued in May concluding the Village Center CDD's bonds are taxable, or not apply the TAM retroactively to the bonds.

The IRS is arguing that the Village Center CDD does not qualify as a political subdivision that can issue tax-exempt bonds, because its board is, and will always be, controlled by the developer rather than publicly elected officials.

"We believe that an entity that is organized and operated in a manner intended to perpetuate private control, and to avoid indefinitely responsibility to a public electorate, cannot be a political subdivision of a state," the IRS said in the TAM.

But Israel said when the IRS announced that it was considering proposing tax law changes governing public retirement systems that included this same definition of political subdivision, muni market participants were assured it would not be applied to tax-exempt bond financings.

In Announcement 2011-78, issued in December 2011 to raise the idea of possible changes in tax regulations for public retirement systems, the IRS said it was considering a new two-part definition of a political subdivision of a state, that said, in part, "the governing officers of the authority must be appointed by state officials or publicly elected."

However, that announcement stated the new definition would not be applied to Section 103 of the Internal Revenue Code, which governs tax-exempt financings.

Also, less than six months later, in May 2012, Jim Polfer, head of the bond branch in the IRS chief counsel's office, told members of the American Bar Association's tax-exempt financing committee that the new definition was not intended to apply to tax-exempt financings. He also said the new definition would not be adopted for public retirement systems without rulemaking — proposed rules, public comments, then final rules.

Yet it was Polfer who signed the TAM for the Village Center CDD a year later in May.

Israel told Harrigal and Hubbard that the ABA committee meeting was recorded and transcribed so there is public record of what Polfer told the bond lawyers.

“The rationale and holding of the TAM is not only inconsistent with prior law, but even the person who signed the TAM indicated less than a year earlier that a change from that prior law to a requirement that the governing body of a political subdivision must be controlled by a general electorate would not occur without a substantial rulemaking process,” Israel told Hubbard and Harrigal.

“The [Village] Center District continues to believe that the TAM is incorrectly decided and should be withdrawn,” Israel said. “However, at the very least [the CDD] urges that ... the rationale and conclusions of the TAM should not be applied retroactively to bonds previously issued by the [CDD]. To do otherwise would be a shameful abandonment by the Service of proper procedures relating to changes in law, particularly when Service personnel have publicly stated that such changes would not take place without a rulemaking process.”



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