Passed: 5-1 (Pam 5)

ORDINANCE 93-43

AN ORDINANCE AUTHORIZING THE ISSUANCE AND SALE OF $2,300,000 CITY OF BLOOMINGTON, INDIANA ECONOMIC DEVELOPMENT REVENUE REFUNDING BONDS (MBA CAPITAL CORP. PROJECT) (THE KROGER CO. - GUARANTOR), SERIES 1993, AND THE EXECUTION AND DELIVERY OF RELATED FINANCING DOCUMENTS TO WHICH THE CITY IS A PARTY (Refinancing Kroger Plaza Economic Development Revenue Bonds)

WHEREAS, the City of Bloomington, Indiana (the "Issuer") by virtue of the laws of the State of Indiana, including Title 36, Article 7, Chapters 11.9 and 12 of the Indiana Code, as amended (the "Act"), is authorized and empowered among other things: (a) to make a loan to refund and retire bonds previously issued to assist in the financing of the acquisition, construction and installation of certain commercial facilities currently owned by MBA Capital Corp., a New York corporation (the "Company") and leased to The Kroger Co., an Ohio corporation ("Kroger"), within the boundaries of the Issuer (the "Project"); (b) to issue and sell its revenue bonds to provide moneys for such loan; and, (c) to enact this Bond Legislation and execute and deliver the agreements and instruments hereinafter identified; and

WHEREAS, the Common Council (the "Legislative Authority") has determined and does hereby confirm that the refunding and retirement of the outstanding principal amount of $2,750,000 City of Bloomington, Indiana Economic Development First Mortgage Revenue Bonds, Series 1981 B (MBA Capital Corp. Project - The Kroger Co., Lessee and Guarantor), dated June 1, 1981 (the "Prior Bonds"), would be of benefit to the economic and general welfare of the Issuer and the State of Indiana, and that by assisting with the refunding and retirement of the Prior Bonds through the issuance of revenue bonds in the principal amount of $2,300,000, the Issuer will be acting in compliance with the provisions of the Act; and

WHEREAS, the Company has requested the Issuer to issue its Economic Development Revenue Refunding Bonds (MBA Capital Corp. Project) (The Kroger Co. - Guarantor), Series 1993, in an aggregate principal amount of $2,300,000, pursuant to the Act, the Indenture (hereinafter defined) and this Ordinance for the purpose of refunding the Prior Bonds; and

WHEREAS, substantially final forms of the Indenture, the Refunding Bonds, the Agreement, the Purchase Agreement, the Disposition Agreement, Tax Regulatory Agreement and the Offering Circular, each as defined below, have been submitted to the Issuer; and

NOW, THEREFORE, BE IT HEREBY ORDAINED BY THE COMMON COUNCIL OF THE CITY OF BLOOMINGTON, MONROE COUNTY, INDIANA:

Section 1. Definitions. In addition to the words and terms defined elsewhere in this Ordinance, unless the context or use clearly indicates another meaning or intent:

"Agreement" means the Loan Agreement, dated as of even date as the Indenture, as amended or supplemented from time to time.

"Bond Fund" means the Bond Fund created in Section 5.02 of the Indenture.

"Certificate of Award" means the Certificate signed by the Mayor setting forth the interest rate on the Refunding Bonds pursuant to Section 4 hereof.

"Clerk" means the Clerk of the Issuer.

"Code" means the Internal Revenue Code of 1986, as amended, including, when appropriate, the statutory predecessor of the Code, and all applicable regulations (whether proposed, temporary or final) under that Code and the statutory predecessor of the Code, and any official rulings and judicial determinations under the foregoing applicable to the Refunding Bonds.

"Common Council" means the Common Council of the City of Bloomington, Indiana.

"Company" means MBA Capital Corp., a New York corporation and its lawful successors and assigns to the extent permitted by the Agreement.

"Disposition Agreement" means the Disposition Agreement dated as of October 1, 1993 among the Guarantor, the Company, the Issuer and the Trustee, as amended or supplemented from time to time.

"Guarantor" means The Kroger Co., an Ohio corporation, duly qualified to transact business in the State, and its lawful successors and assigns.

"Guaranty" means the Guaranty Agreement among the Guarantor, the Issuer and the Trustee, dated as of even date as the Indenture, as amended or supplemented from time to time.

"Indenture" means the Trust Indenture, dated as of October 1, 1993, between the Issuer and the Trustee, as amended or supplemented from time to time.

"Interest Payment Date" means, as to the Refunding Bonds, each date set forth as such in the form of Refunding Bonds attached as Exhibit A to the Indenture.

"Loan Payments" means the amounts required to be paid by the Company pursuant to the provisions of the Note and Section 4.1 of the Agreement.

"Mayor" means the Mayor of the Issuer.

"Note" means the nonnegotiable promissory note of the Company payable to the Trustee, dated as of even date with the Refunding Bonds, in the form attached to the Agreement as Exhibit A, evidencing the obligation of the Company to make Loan Payments.

"Offering Circular" means the Offering Circular describing the Refunding Bonds, the Issuer, the Company, the Guarantor and the Project.

"Ordinance" means this Ordinance providing for the issuance of the Refunding Bonds and approving the Agreement, the Indenture and related matters, as amended or supplemented from time to time.

"Original Purchaser" means, as to the Refunding Bonds, the person or persons identified as the purchaser or purchasers in the Purchase Agreement.

"Owner" or "Owner of Refunding Bond" means the person in whose name a Refunding Bond is registered on the Bond Register for which provision is made in Section 3.06 of the Indenture.

"Person" or words importing persons mean firms, associations, partnerships (including without limitation, general and limited partnerships), joint ventures, societies, estates, trusts, corporations, public or governmental bodies, other legal entities and natural persons.

"Prior Bonds" means City of Bloomington, Indiana Economic Development First Mortgage Revenue Bonds, Series 1981 B (Bloomington Plaza Company Project -- The Kroger Co., Lessee and Guarantor), dated as of June 1, 1981.

"Project" means the real property and fixtures at the time comprising the Project, as defined in the Agreement, comprising an commercial facility.

"Project Purposes" means the refunding of the Prior Bonds, which were originally issued to assist Bloomington Plaza Company, the original owner of the Project, in financing the acquisition and construction of the Project, or any other use permitted under the Agreement.

"Purchase Agreement" means the Bond Purchase Agreement among the Issuer, the Company, the Guarantor and the Original Purchaser.

"Refunding Bonds" means the $2,300,000 Economic Development Revenue Refunding Bonds (MBA Capital Corp. Project) (The Kroger Co. - Guarantor), Series 1993, dated as of October 1, 1993, authorized in Section 3 hereof and Section 2.02 of the Indenture.

"Refunding Fund" means the Refunding Fund created in Section 5.01 of the Indenture.

"Revenues" means (a) the Loan Payments, (b) all other moneys received or to be received by the Issuer or the Trustee in respect of payments under the Note, including, without limitation, moneys and investments in the Bond Fund, as defined in the Indenture and the investment of such moneys, (c) any moneys and investments in the Refunding Fund, and (d) all income and profit from the investment of the foregoing moneys. The term "Revenues" does not include any moneys or investments in the Rebate Fund and the Refunding Fund.

"State" means the State of Indiana.

"Tax Regulatory Agreement" means the Tax Regulatory Agreement dated as of October 1, 1993 among the Issuer, the Company, the Guarantor and the Trustee.

"Trustee" means collectively, Star Bank, National Association, Cincinnati, Ohio and Star Bank, National Association, Eastern Indiana, Richmond, Indiana, both national banking associations, or such other institution qualified to act as Trustee, acceptable to the Company and the authorized representative of the Issuer, as shall be named in the Indenture, until a successor Trustee shall have become such pursuant to the applicable provisions of the Indenture, and thereafter "Trustee" shall mean the successor Trustee.

The captions and headings in this Ordinance are solely for convenience of reference and do not define, limit or describe the scope or intent of any provisions or Sections of this Ordinance.

Section 2. Determinations by Issuer. The Issuer has determined that: (a) the Project is a project as defined in the Act, the issuance of refunding revenue Bonds for the financing of which is permitted by the Act; (b) the utilization of the Project and the issuance of the Refunding Bonds will create and preserve

jobs and employment opportunities, and will promote the prosperity, economic stability and general welfare of the Issuer and its citizens; and (c) the refinancing of the Project will require the issuance, sale and delivery of the Refunding Bonds in the principal amount of $2,300,000. The Issuer elects to have the provisions as to the $10,000,000 limit in Section 144(a)(4) of the Internal Revenue Code of 1986, as amended (the "Code") apply to the Refunding Bonds.

Section 3. Authorization of Refunding Bonds. The Issuer shall issue, sell and deliver, as provided and authorized herein and in the Indenture and pursuant to the authority of the Act, $2,300,000 principal amount of Refunding Bonds for the purpose of refinancing the Project. The Refunding Bonds shall be designated Economic Development Revenue Refunding Bonds (MBA Capital Corp. Project) (The Kroger Co. - Guarantor), Series 1993.

Section 4. Terms and Provisions of Refunding Bonds.

(a) Generally. The Refunding Bonds (i) shall be issued only in fully registered form, substantially in the form set forth in Exhibit A to the Indenture; (ii) shall be exchangeable for Refunding Bonds of authorized denominations, as provided in the Indenture; (iii) shall be numbered in such manner as to distinguish each Refunding Bond from any other Refunding Bond; (iv) shall be in the denomination of $5,000 and any integral multiple thereof; (v) shall be subject to optional, mandatory and mandatory sinking fund redemption in the amounts, upon the conditions, and at the times and prices set forth in the Indenture; (vi) shall be dated as of October 1, 1993; and (vii) and shall mature on June 1, 2007. Each Refunding Bond shall bear interest at the rate designated in the Certificate of Award, which rate shall not exceed ten percent (10%) per annum, from the most recent date to which interest has been paid or duly provided for or, if no interest has been paid or duly provided for, from October 1, 1993.

(b) Execution. The Refunding Bonds shall be executed on behalf of the Issuer by the Mayor and attested by its Clerk, by manual or facsimile signature, and shall bear the seal, or a facsimile of the seal, of the Issuer.

Section 5. Sale of Refunding Bonds. The Refunding Bonds will be sold and delivered to the Original Purchaser, in accordance with the Purchase Agreement, at the purchase price of par, plus any accrued interest on the principal amount of the Refunding Bonds from October 1, 1993, to the date of delivery of and payment therefor.

The Mayor is authorized and directed to make the necessary arrangements with the Original Purchaser to establish the date, location, procedure and conditions for the delivery of the Refunding Bonds to the Original Purchaser and to take all steps necessary to effect due execution, authentication and delivery to the Original Purchaser of the Refunding Bonds under the terms of this Ordinance, the Indenture, the Agreement and the Purchase Agreement.

It is determined by the Issuer that the price for and the terms of the Refunding Bonds, determined as provided in this Ordinance, and the sale thereof, as provided in this Ordinance and the Indenture, are in the best interests of the Issuer and are in compliance with all legal requirements. The distribution of the Offering Circular relating to the Refunding Bonds is approved hereby. The use and distribution of the Offering Circular relating to the original issuance of the Refunding Bonds substantially in the form on file with the Issuer at the effective date hereof, and any supplements thereto, is authorized hereby. The Issuer has not confirmed, and assumes no responsibility for, the accuracy, sufficiency or fairness of any statements in the Offering Circular or any supplements thereto, or in any reports, financial information, offering or disclosure

documents or other information in any way relating to the Refunding Bonds, the Project, the Company, or the Original Purchaser.

Section 6. Allocation of Proceeds of Refunding Bonds. The proceeds from the sale of the Refunding Bonds (including, without limitation, any accrued interest thereon) shall be allocated, deposited and credited as follows:

(i) to the Bond Fund created by the Indenture, any accrued interest paid by the Original Purchaser; and

(ii) to the Refunding Fund created by the Indenture, the balance of the proceeds of the Refunding Bonds.

Section 7. Security for the Refunding Bonds. To the extent provided in, and except as otherwise permitted under the Indenture, the Refunding Bonds shall be equally and ratably payable solely from the Revenues and shall be secured by an assignment of the Revenues by the Indenture. The Refunding Bonds also shall be secured by the Note given by the Company to the Trustee pursuant to the Agreement, by the Guaranty given by the Guarantor to the Trustee and by the conditional assignment by the Company to the Trustee of the lease of the Project from the Company to the Guarantor.

Section 8. Covenants and Agreements of the Issuer. In addition to the other covenants and agreements of the Issuer in this Ordinance and the Indenture, the Issuer covenants and agrees that:

(a) Arbitrage Provisions and Issuer Information Return. The Issuer covenants that it will, insofar as within its power to do so, restrict (or require to be restricted) the use of the proceeds of the Refunding Bonds in such manner and to such extent as may be necessary so that the Refunding Bonds will not constitute arbitrage Bonds under Section 148 of the Code. The Mayor, or any other officer having responsibility for the issuance of the Refunding Bonds, alone or in conjunction with the Company or any officer, employee or agent of or consultant to the Company, shall give:

(i) an appropriate certificate of the Issuer for inclusion in the transcript of proceedings for the Refunding Bonds setting forth the reasonable expectations of the Issuer regarding the amount and use of all the proceeds of the Refunding Bonds, the facts, estimates and circumstances on which they are based and other facts and circumstances relevant to the tax treatment of interest on the Refunding Bonds, as provided by the Company, all as of the date of delivery of and payment for the Refunding Bonds; and

(ii) the statement setting forth the information required by Section 149(e) of the Code, which shall be based on the relevant information provided by the Company.

The Issuer covenants that it (i) will, insofar as in its power to do so, take, or require to be taken, all actions that may be required of it for the interest on the Refunding Bonds to be and to remain excluded from gross income for federal income tax purposes, and (ii) will not take or authorize to be taken any actions that would adversely affect the exclusion under the provisions of the Code. The appropriate officers of the Issuer are hereby authorized and directed to take any and all actions and make or give reports and certifications, as may be appropriate to assure such exclusion of that interest.

(b) Transcript of Proceedings. The Issuer shall furnish or cause to be furnished to the Original Purchaser a true transcript of proceedings, certified by an officer of the Issuer of (i) all proceedings had with reference to the issuance of the Refunding Bonds and (ii) any other information from the records of the

Issuer which may be necessary or appropriate to determine the regularity and validity of the issuance of the Refunding Bonds.

Section 9. Indenture, Agreement, Disposition Agreement, the Tax Regulatory Agreement and Purchase Agreement. To provide for the issuance and sale of the Refunding Bonds and the consummation of the transactions contemplated therein, the Mayor and the Clerk are authorized and directed, for and in the name and on behalf of the Issuer, to execute, acknowledge and deliver, the Indenture, the Agreement, the Disposition Agreement, Tax Regulatory Agreement and the Purchase Agreement in substantially the forms submitted to the Issuer. Those instruments, including the exhibits thereto, are approved with changes therein not inconsistent with this Ordinance and not substantially adverse to the Issuer, and which are permitted by the Act, and shall be approved by the officers executing the Indenture, the Agreement, the Disposition Agreement, Tax Regulatory Agreement and the Purchase Agreement; provided, that the approval of those changes by those officers, and their character as not being substantially adverse to the Issuer, shall be evidenced conclusively by their execution of those instruments.

Section 10. Other Documents. The Mayor and the Clerk, and the other officers of the Issuer, are authorized and directed to execute and deliver for and on behalf of the Issuer any certifications, including the Certificate of Award, financing statements, assignments and instruments which are necessary or appropriate to perfect the assignments set forth in the Indenture and to consummate the transactions contemplated in this Ordinance, the Indenture, the Agreement, the Disposition Agreement, Tax Regulatory Agreement and the Purchase Agreement.

Section 11. Authorized Issuer Representative. Both the Mayor and the Clerk are hereby designated an Authorized Issuer Representative, as such term is defined in the Indenture, for the purpose of acting on behalf of the Issuer pursuant to the Agreement and the Indenture.

Section 12. Effective Date. This Ordinance shall be in full force and effect immediately upon its adoption and compliance with Indiana Code 36-3-4-14.

Section 13. Further Action By Issuer. From time to time during the term of the Project, the proper officers of the Issuer are hereby authorized to execute and to deliver such documents and instruments and to take such actions as they, in their sole discretion, shall deem necessary, appropriate or desirable, including but not limited to the granting of easements, rights of way and other rights, liberties and privileges; and the proper officers of the Issuer are hereby authorized to execute such other agreements, documents and instruments and take such actions as they may, in their sole discretion, deem necessary or appropriate to carry out the Project and the financing thereof.

Section 14. Issuer Fees and Expenses. The fees and out-of-pocket expenses of the Issuer and its counsel shall be paid by the Company from its available funds.

Section 15. Severability. The provisions of this Ordinance are hereby declared to be severable and if any section, phrase or provision shall for any reason be declared to be invalid, such declaration shall not affect the validity of the remainder of the sections, phrases or provisions hereof, it being the intent of the Issuer that such remainder shall be and shall remain in full force and effect.

Section 16. Ratification of Prior Actions. All prior actions of the Issuer with respect to issuance of the Refunding Bonds and the Project are hereby ratified and confirmed to the extent not inconsistent with the provisions of this Ordinance.

Section 17. Repealer. All Ordinances or parts of

Ordinances inconsistent herewith expressly are repealed.

Section 18. Limited Obligations. The Issuer has no taxing power and no holder of any Refunding Bonds has the right to compel any exercise of taxing power of the Issuer or the State of Indiana to pay the Refunding Bonds or the interest thereon, and the Refunding Bonds do not constitute an indebtedness of the Issuer or a loan of credit thereof within the meaning of any constitutional or statutory provision. The Refunding Bonds, the premium, if any, the principal and the interest thereon shall not be deemed to constitute a debt secured by a pledge of the faith and credit of the State of Indiana or any political subdivision thereof, including the Issuer. Neither the State of Indiana nor any political subdivision thereof, including the Issuer, shall be obligated to pay the principal of, or other costs incident thereto except from the revenues, receipts and payments pledged therefor, and neither the faith and credit nor the taxing power of the State of Indiana or any political subdivision thereof, including the Issuer, is pledged to the payment of the principal of, premium, if any, or interest on the Refunding Bonds or other costs incident thereto. No recourse shall be had for the payment of the principal of, premium, if any, and the interest on the Refunding Bonds against any officer, director, agent or employee of the Common Council.

Section 19. Compliance with IRS Section 147(f). For purposes of complying with Section 147(f) of the Code, the Common Council and the Mayor hereby approve the issuance of Refunding Bonds in the maximum aggregate principal amount of $2,300,000 to be loaned to the Company to refund the Prior Bonds which were issued to finance the Project comprising an approximately 56,475 square foot supermarket and fixtures, equipment and other improvements, including a parking area adjacent to the store, including the site located at the southeast corner of Covenanter and College Mall Road, Bloomington, Indiana, which is owned by the Company and leased to and operated by the Guarantor.

Section 20. Compliance with Open Meeting Requirements. All formal actions of the Common Council concerning and relating to the passage of this Ordinance were enacted in an open meeting of the Common Council, open to the public in compliance with all legal requirements.

Section 21. Full Force and Effect. This ordinance shall be in full force and effect after its passage by the Common Council of the City of Bloomington and approved by the Mayor.

PASSED AND ADOPTED by the Common Council of the City of Bloomington, Monroe County, Indiana, upon this 15th day of September, 1993.

JACK W. HOPKINS, President
Bloomington Common Council

ATTEST:

PATRICIA WILLIAMS, Clerk
City of Bloomington

PRESENTED by me to the Mayor of the City of Bloomington, Monroe County, Indiana, upon this 16th day of September, 1993.

PATRICIA WILLIAMS, Clerk
City of Bloomington

SIGNED and APPROVED by me upon this 16th day of September, 1993.

Tomilea Allison

TOMILEA ALLISON, Mayor
City of Bloomington

SYNOPSIS

This Ordinance authorizes the issuance and sale of $2,300,000 in economic development refunding bonds for the refunding and retirement of previously issued bonds used to finance the acquisition, construction and installation of certain commercial facilities owned by MBA Capital Corporation and leased to The Kroger Company for operation of the Jackson Creek Kroger store in Bloomington, Indiana.

Signed copies to:
Legal Dept. - 2
Petitioner

City of Bloomington Indiana

Post Office Box 100
Municipal Building
Bloomington, Indiana 47402

Telephone 812 331 6409

Office of the Common Council

To: Councilmembers
From: Council Office
Re: Kroger's Response to Council Suggestions
Date: September 8, 1993

Yesterday, four councilmembers (Jack, Jim, Pam, and Tony) met with Tom Ruemler (College Mall Kroger) and Abbott Thayer (their attorney) to talk about benefits Kroger could bestow on our community in connection with their request to refinance Economic Development Bonds. Various suggestions were offered including: assistance with Bloomington Transit service to the Plaza, landscaping, signage/traffic, dispensing of trash tags at the cashiers stations, cash contributions to a local agency, and giving away old produce.

Tom Ruemler called me with their initial response today.

TRANSIT: Transit wanted to shorten their route through the plaza and travel over thicker asphalt, without bearing the cost of the improvements. Tom was willing to accommodate the change but said the matter was ultimately in the hands of their landlord, who he was contacting.

LANDSCAPING: Pam wanted more trees in the lot. Tom indicated that Kroger is open to more landscaping as long as it does not reduce parking. I suggested that Lee Huss and someone from the Plan Department could offer some ideas for them. They in turn will contact their landlord.

SIGNAGE/TRAFFIC: Jim thought some of the traffic flow in the plaza was confusing. Kroger, with approval of the landlord, will improve the pavement markings, particularly at the corner near Blockbuster Video.

TRASH TAGS SOLD AT CASHIER: Pam wanted trash tags sold at the cash regesters. Tom says that because they make no money selling the tags, they must be sure not to incur any loss in dispensing them. Selling them at the office, like most other grocery stores in town, gives them control over distribution of the tags. The tags are also not easy to fit in their cashier stations. With these concerns, in mind they are willing to cooperate with the City in making the purchase of tags an easy process.

206
5 Hrs
6 mo INV

CASH DONATION: Jack suggested some straight cash donation to a worthy cause. Tom offered to give $5,000 to the United Way or other agency.

OLD PRODUCE TO FOODBANK: Tony suggested that Kroger give away old produce as well as old bakery goods. Tom spoke with Hoosier Hill Food Bank about arranging this. (Tom King)

*** AMENDMENT FORM 1 ***

ORDINANCE #: 93-43

SUBMITTED BY: Council Office

COMMITTEE ACTION: None

PROPOSED AMENDMENT:

1. Amend Section 2 of the ordinance by replacing the words "Section 144(c)(4)" with "Section 144(a)(4)" where they appear in that provision of the ordinance.

SYNOPSIS

This amendment corrects an erroneous reference to the IRS Code.