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March 11, 2010

J.P. Van Hollen, Attorney General
Wisconsin Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Re: TID Amendment and Related City Ordinances

Dear Attorney General Van Hollen:

As the Acting Corporation Counsel, Milwaukee County is seeking an opinion from your office. The questions we would like answered are as follows:

1. Can a Joint Review Board ("JRB") created under 66.1105 (4m) of the Wisconsin Statutes approve an amendment to a Tax Incremental District (TID) to provide for payment of already scheduled street paving work, where the sole reason for the amendment is "freeing up street paving dollars in the City's regular capital budget for use on street projects in areas more than one-half mile from a TID"?
2. Can a JRB created under Section 66.1105 (4m) Wis. Stats., approve the creation of a TID which includes street paving expenses which relate to street paving which has already been planned by the City before the TID is created in order to free up "street paving dollars in the City's regular capital budget for use on street projects in areas more than one-half mile from a TID"?

Background

Chapter 66.1105 of the Wisconsin Statutes provides for the creation and amendment of Tax Incremental Districts (TID). Chapter 66.1105 provides, among other things, for the types of costs that may be included in a TID and the process that must be followed in the creation and amendment of TIDs. Both the initial creation of a TID and the amendment of a TID must be approved by a JRB which consists of representatives from the various taxing authorities within the geographic area encompassed within the TID.

When approving the creation of an initial TID or an amendment to a TID the JRB must conclude that "in its judgment, the development described in the documents the board has reviewed... would not occur without the creation of a tax incremental district." 66.1105 (4m)(b) 2.

The JRB shall base its decision regarding approval or amendment of the TID on several criteria including "Whether the development expected in the tax incremental district would occur without the use of tax incremental financing." 66.1105 (4m)(c) Wis. Stats.

The statutes, therefore, require the JRB to conclude that "but for" the TID, the development contemplated to occur within the TID would not occur.

Common Council Resolutions

The City of Milwaukee Common Council approved two resolutions relevant to the present matter. Resolution number 090206 provides for the amendment of certain TIDs. The relevant language of the Resolution is as follows:

Whereas, Section 66.1105(2)(f), Wis. Stats., allows for tax incremental financing to be used to fund the costs of public works or improvements outside a tax incremental district ("TID") but within one-half mile of the district's boundaries; and

Whereas, This statutory provision presents an opportunity for the City of Milwaukee to use tax incremental financing to fund street paving and construction projects within one-half mile of TID boundaries, thereby freeing up street paving dollars in the City's regular capital budget for use on street projects in areas more than one-half mile from a TID; and

Whereas, To fund street projects in this manner, the project plan for an active TID could be amended to include some or all street-paving projects anticipated to occur within the TID or within one-half mile of the TID's boundaries within the next 6 years, as identified by the City's most current 6-year local street paving program; and

Similar language can be found in City of Milwaukee Common Council Resolution 090623 relating to the creation of new TIDs:

Whereas, Section 66.1105(2)(f), Wis. Stats., allows for tax incremental financing to be used to fund the costs of public works or improvements outside a tax incremental district but within one-half mile of the district's boundaries; and

Whereas, This statutory provision presents an opportunity for the City of Milwaukee to use tax incremental financing to fund street paving and construction projects within one-half mile of tax incremental district boundaries, thereby freeing up street paving dollars in the City's regular capital budget for use on street projects in areas more than one-half mile from a district; now, therefore

The Mayor and Common Council of the City of Milwaukee do ordain as follows:

Part I. Section 304-95 of the code is created to read:

304-95. Tax Incremental Districts-Inclusion of Street Paving Costs in Project Plans. In preparing the project plan for any new tax incremental district, the department of city development shall include in the plan, as project costs, the costs of all street paving projects anticipated to occur within the district and within one-half mile of the district's boundaries within the next 6 years, as identified by the city's most recent 6-year local street paving program. The department of city development shall consult with the department of public works in identifying all street paving projects to be included in the project plan.

Amendment No. 4, Project Plan for Tax Incremental Financing District No.34

Consistent with the above Common Council Resolutions an amendment to TID #34 has been drafted to allow for the inclusion of paving costs in the project costs of TID #34. Given that the rationale supporting the amendment relates to the desire to complete work that is already contemplated as part of the city's six year paving plan, the amendment does not appear to meet the "but for" test of Section 66.1105 (4m) Wis. Stats. We seek guidance on this point and on the related issue relevant to the creation of new TIDs.

Please contact me if you need any further information regarding this matter.

Sincerely,


Timothy R. Schoewe
Acting Corporation Counsel

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