



WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.

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January 12, 2018

Carrie Riepl, City Clerk
City of Eau Claire
203 S. Farwell Street
Eau Claire, Wisconsin 54702-5148

Re: NOTICE OF CLAIM & INJURY
Eau Claire Tax Increment District No. 12

Dear Ms. Riepl:

The Wisconsin Institute for Law & Liberty is a public policy legal center that seeks to advance the rule of law and the public interest in open and transparent government. WILL represents Voters with Facts and a number of Eau Claire taxpayers, all as set forth below. Our clients have serious concerns regarding the manner in which the City Council, the Plan Commission, and the Joint Review Board have failed to comply with the Wisconsin statutes that authorize tax incremental financing. In particular, they have exceeded their authority in connection with their recent actions in enacting Eau Claire Tax Increment District No. 12.

The Statutory Framework

The Wisconsin statutes relating to tax incremental financing (“TIF”) were enacted in 1975. Their purpose was to provide Wisconsin municipalities with a method for financing certain kinds of urban redevelopment projects. Municipalities are permitted to create a tax increment district (“TID”) in which the incremental tax revenues from increasing property values that result from a targeted development project may be committed to pay some or all of the development costs. Because the statutes permit the diversion of revenue that would ordinarily go to other taxing jurisdictions, they provide that municipal action must be approved by a Joint Review Board that includes representatives of the governmental entities that will be affected.

The Wisconsin statutes specify in detail the procedures that Wisconsin cities must follow in order to create a TID. They have not been given the power to create TIDs for general purposes of urban development. To the contrary, a TID may be created for one of only four purposes: (a) addressing blighted areas as defined in the statute; (b) urban rehabilitation or conservation under Wis. Stat. §66.137(2m); (c) industrial development under Wis. Stat. §66.1101; and (d) the promotion of mixed use development as defined by Wis. Stat. 66.105(2)(cm). TID No. 12 has ostensibly been created to promote “mixed use” development.

The Joint Review Board and the “but for” test.

The purpose of a TID is to create a dedicated revenue stream – the incremental tax revenue associated with the increasing value of properties in the district – that can be used to finance development projects within the district. The framework for the creation of a TID assumes that the incremental revenue results from the development projects in question, and would not have been realized in the absence of the government financed improvements envisioned by the TID Project Plan. For the purpose of allocating tax levies, the law requires that incremental taxable values in the TID be removed from the tax base, thereby increasing the tax rates that would otherwise be borne by taxpayers. This affects both taxpayers in the municipality and in overlapping tax jurisdictions. If rates are not increased, then the enacting municipality will be deprived of tax revenue that could otherwise be used for general purposes. Likewise, if county and school district rates are not raised, the TID will also deprive those taxing jurisdictions from their share of the incremental tax revenue associated with the TID.

For that reason, the Wisconsin statutes that authorize the creation of a TID require the creation of a Joint Review Board that must review and approve the creation of any TID districts within their jurisdiction. The Joint Review Board must include a taxpayer representative as well as representatives of each of the taxing entities that will be affected by the creation of the TID. Wis. Stat. §66.1105(4m). The Joint Review Board must consider and approve any municipal resolution creating or amending a TID district. Wis. Stat. §66.1105(4)(gs).

The statutes require the Joint Review Board to review the public record, planning documents, and the resolution passed by the local legislative body, and to hold one or more hearings on the TID proposal. And the statutes specifically provide that “[t]he board may not approve the resolution [creating the TID] under this subdivision unless the board’s approval contains a positive assertion that, in its judgment, the development described in the documents the board has reviewed under subd. 1 would not occur without the creation of a tax incremental district.” Wis. Stat. §66.1105(4m)(b)1 and 2. In other words, the JRB must find that the incremental tax revenue set aside as a result of the TID would never have been realized if the TID had never been created.

This “but for” test is intended to check the power of municipalities and to assure that there is broad agreement within all of the affected communities that public funds are in fact being spent for projects that are appropriate for funding tax incremental financing. Before the Joint Review Board approves the creation of a TID, it is required to consider the record and to make a *judgment* that the “but for” test has been satisfied. An unsupported and conclusory assertion that the test has been met should not suffice. The Board must give some explanation of the facts it has considered, and the reasons it has reached the judgment that is required. It has not done so in the case of TID 12.

In addition, the judgment of the Joint Review Board must be true. In other words, it must be, at the very least, reasonable to conclude that the incremental tax revenue would not have been realized “but for” the TID.

TID 12 was approved by the Eau Claire City Council on September 12, 2017 and by the Joint Review Board on September 15, 2017.

The Project Plan for TID 12 provides a detailed list of estimated project cost expenditures by the City for three projects: the expansion and improvement of an existing city-owned parking lot located outside the TID; the “reconstruction” of part of the existing Chippewa River trail and its extension by purchase of intervening blocks of housing if the owners of that housing are willing to sell; and the funding of a revitalization program for a residential neighborhood which is likewise located outside the TID. None of these “development” projects will be undertaken until sometime in 2019, as that is the first year in which the TID 12 Plan projects that any project costs will be incurred.

On their face, these projects do not appear to be the kind that would be expected to generate improvements in the actual TID as further evidenced by the fact that the plan includes a tax increment relating to an immediate increase in property values within the TID of \$14,000,000, well before any spending under the project plan is expected to take place. In fact, this dramatic increase in property values relates to the addition of a single new building within the TID in 2017. And, in fact, that new building had been developed, constructed, and even occupied before the JRB even considered whether or not it should approve TID 12. With respect to this property, the JRB cannot possibly have properly concluded “in its judgment, the development... would not occur without the creation of a tax incremental district.” It had already occurred before TID 12 was created.

The property in question is 222 Water Street, a new building known as the Aspenson Mogensen residence hall of the University of Wisconsin – Eau Claire. It is a four-story structure that includes retail space on the first floor and dormitory residences for UWEC students on the top three floors. The building had been completed, and the students had already moved into their rooms, by the time the City’s Plan Commission, its Council, or the JRB considered TID 12. The \$14,000,000 tax incremental value of this building cannot possibly have justified the creation of TID 12, as plainly the development would occur – in fact it already had occurred – without the creation of TID 12. It is noteworthy that the developer had originally stated that he would not build the building without the creation of a TID, but nonetheless proceeded without one.

It is unlawful to consider and approve a TID project plan that involves “incremental” tax revenue from property that was fully developed before the TID was enacted. Putting such property into a TID removes the property from the allocable tax base, and burdens the other taxpayers in the municipality and overlapping taxing jurisdictions with the taxes that would otherwise be allocated to the new property. A TID that includes already developed and occupied property cannot pass any version of the “but for” test.

And finally, it appears that the JRB assumed that two additional buildings will be constructed within the TID over the next several years, adding their value to the tax incremental revenue to be used to support the Project Plan. These are developments that have already been planned, and there is no reason to suppose that they would not proceed to completion whether or not the City made the improvements contemplated by the TID 12 Project Plan.

TID 12 does not and cannot meet the “but for” test required by the Wisconsin statutes.

Conclusion

For the reasons set forth above, we do not believe that the actions of the City Plan Commission, the Eau Claire Common Council, and the Joint Review board in creating TID 12 are in compliance with Wisconsin law. Accordingly, the expenditure of any Eau Claire taxpayer funds to implement the TID 12 Project Plan is and will be unlawful. Our clients have suffered, and will continue to suffer, an injury. Taxpayer funds have been committed and will be spent in an unlawful manner, diverting funds that could be spent for other purposes, and our clients’ tax bills will be larger than they otherwise would be. Our clients do not seek monetary damages. The relief they seek is: (a) an acknowledgment by the City of Eau Claire and the JRB that their conduct did not comply with the Wisconsin Statutes governing the creation and amendment of TIF districts, and are therefore unlawful, void, and of no force and effect; and (b) the cessation of any and all actions by the City to implement TID #12.

Should the City take any actions that are based on the premise that TID 12 has been validly created, we will consider our clients’ claims to have been disallowed, and proceed accordingly.

Voters with Facts is an Eau Claire organization and its members are Eau Claire City and Eau Claire County taxpayers. Our individual clients are Eau Claire City and County taxpayers as well. Our clients do not assert these claims lightly, and we trust that you will give them due consideration and a prompt decision on the merits.

Very truly yours,

WISCONSIN INSTITUTE FOR LAW & LIBERTY



RICHARD M. ESENBERG
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